FILED
SEP 5 - 2003

No. 03 369

In The

Supreme Court of the United States

RONALD W. MORTERS,

Petitioner,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To The Wisconsin Court Of Appeals, District I

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Did the Wisconsin Court of Appeals' failure to adhere to Wisconsin's uniform standards of appellate review in reviewing the frivolity determination in this case and the Wisconsin Supreme Court's failure to rectify the Court of Appeals' error violate Ronald W. Morters' rights to equal protection of the law and due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution?

LIST OF PARTIES

The caption of this petition identifies all of the parties who have participated in both the trial court and appellate proceedings in this case. Shannon L. Morters was also a plaintiff in the consolidated actions, but she has not participated in the appellate proceedings because no fee assessment was made against her. The Morters' attorney, Robert E. Sutton, did not appeal from the fee assessment against him. Because this petition involves a deprivation of Fourteenth Amendment rights by the Wisconsin appellate courts, copies of this petition have been forwarded to the Attorney General for the State of Wisconsin.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Ronald W. Morters, prays that a Writ of Certiorari issue to review the decision of the Wisconsin Court of Appeals, District I, entered in this action on March 25, 2003 and the order of the Wisconsin Supreme Court entered on June 12, 2003 wherein the Supreme Court denied the Petition for Review of said Court of Appeals' decision.

OPINIONS BELOW

The order of the Wisconsin Supreme Court, dated June 12, 2003, denying the Petition for Review is unpublished and reprinted in the Appendix ("App.") to this Petition at E1-2. The decision of the Wisconsin Court of Appeals, District I, dated March 25, 2003, is unpublished and reprinted in the Appendix at A1-10.

JURISDICTION

The decision of the Wisconsin Court of Appeals, District I, was entered on March 25, 2003. A timely Petition for Review of said decision was denied by the Wisconsin Supreme Court in an order entered on June 12, 2003 thereby affirming the Court of Appeals' decision and exhausting all state judicial remedies. This petition for writ of certiorari was filed within 90 days of the date of the Wisconsin Supreme Court's order denying review. The United States Supreme Court has jurisdiction to review the order of the Wisconsin Supreme Court and the decision

of the Wisconsin Court of Appeals pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved in this case is Section 1 of the Fourteenth Amendment of the United States Constitution, which is set forth at App. F1. The state statute involved is Wisconsin Statutes, Sec. 814.025, which is set forth at App. F1-2.

STATEMENT OF THE CASE

A. Proceedings in Waukesha County

Ronald W. Morters, his wife, Ann, and their granddaughter, Shannon, were injured as a result of consecutive automobile accidents which occurred on December 21, 1990. Ronald sustained the most serious injuries. They retained Attorney Charles H. Barr to handle their personal injury claims against the other driver and his insurer. (App. I2) Barr never advised the Morters that his representation of all of them could result in a conflict of interest prohibited by Wisconsin Supreme Court Rule 20:1.8(g). (App. I5)

On June 10, 1993, Barr commenced a lawsuit in Waukesha County Circuit Court on behalf of the Morters against the other driver and his insurer. Policy limits were determined to be $1,000,000.00. The case was scheduled for a jury trial which was to commence on August 15, 1994. (App. I3)

Upon the mutual request of Barr and opposing counsel, the trial was adjourned to allow mediation. Ronald did not authorize or consent to such adjournment and only learned about it after it had occurred. At mediation held on August 15, 1994, the insurer offered $575,000.00 to settle all of the Morters' claims. The Morters rejected the offer and dismissed Barr as their attorney. (App. I4-5, A3)

The Morters hired Aiken & Scoptur, S.C. as their new attorney, and a new trial date was set for July 31, 1995. In June of 1995, their new law firm stipulated to canceling the trial and having the case resolved by arbitration. Ronald had not authorized arbitration, and the Morters subsequently fired Aiken & Scoptur. (App. G4, A3)

Their new attorney, Willis J. Zick, moved to relieve the Morters from the arbitration stipulation but the motion was withdrawn. At Ann's insistence, Ronald proceeded to arbitrate because of her stress and illness which ultimately resulted in her death. (App. G4, I5-6) The arbitrator awarded a total of $557,384.17 on the three claims. (App. A3)

Following the arbitration, Barr and Aiken & Scoptur brought motions to collect on their fee agreements with the Morters. The Morters challenged their former attorneys' entitlement to fees on the grounds that their actions breached their respective representation contracts. Waukesha County Circuit Judge James R. Kieffer ruled that the Morters did not have just cause to discharge their former attorneys and awarded fees to both. (App. B4, G4)

B. Milwaukee County Proceedings on the Merits

1. Commencement of Lawsuits

Ronald and Shannon commenced separate actions[1] for professional negligence and breach of contract against Barr and his insurer, TIG, alleging that Barr had a conflict of interest in representing all three plaintiffs, Barr deprived them of a jury trial by agreeing to adjourn the original trial date, and Barr failed to timely sue, demand policy limits, or file a statutory offer to settle. Ronald's suit also included two claims with respect to the handling of insurance benefits. (App. I2-8) Ann Morters died prior to the filing of these suits. These cases were consolidated for trial before Milwaukee County Circuit Court Judge John A. Franke.

2. Expert Opinions

The Morters presented expert opinions from Attorney Robert M. Tessier of Encino, California and Attorney Leonard W. Schulz of Big Bend, Wisconsin which outlined Barr's negligent behavior and failure to properly represent them in the Waukesha County proceedings. (App. J1-4, K1-3) The Morters also had an opinion from Attorney Patrick Dunphy of Brookfield, Wisconsin, valuing Ronald's case in the $750,000.00 range and the combined damages of Ronald and Ann in excess of $1,000,000.00. (App. L1-3)

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[1] Ronald's action was filed in July of 1999, and Shannon's was commenced in February of 2000.

3. The Granting of Partial Summary Judgment

On October 28, 2000, Barr and TIG moved for summary judgment. Judge Franke granted partial summary judgment at a hearing on January 8, 2001. (App. M1-2, N5-13) The Court granted summary judgment on the jury trial deprivation and conflict of interest claims because it believed there was no causal connection between the alleged negligent acts and any loss by the Morters. (App. M2, N6-8) The Court rejected Barr's issue preclusion argument because the issues arising out of the fee hearing were not sufficiently related to those in this case. (App. M1, N1-5) Ronald's insurance claims were dismissed because he did not respond to that portion of the motion. (App. M2, N13) The Court, however, refused to grant the motion on the remaining claims of negligent handling because the Morters' experts might later provide an evidentiary foundation for the award. (App. M2, N7-13)

4. Trial Proceedings and Direct Verdict

The case was tried before a jury and Judge Franke on May 14 through May 17, 2001. Attorney Tessier testified that Barr was negligent in investigating and preserving the evidence, failing to get a settlement demand to the defense in a timely fashion, and failing to timely file a lawsuit. (App. O1-3) Tessier testified that a reasonable attorney properly preparing the case would have a $1,000,000.00 case. (App. O4) Based on its preclusionary ruling, the Court instructed the jury that such opinion was received only on the issue of how a reasonable plaintiff's attorney should proceed to value this particular case; it was not received for the purpose of showing how a reasonable defense attorney would value the case or what the

insurer would pay to settle this case. (App. O4-6) Attorney Schulz testified that a reasonable attorney should have filed all three cases within one year of the accident. (App. O6-7)

At the conclusion of the Morters' case, Barr moved for a directed verdict. The Court granted the motion orally on May 17, 2001 and filed a written decision on July 3, 2001 supplementing its ruling. The Court granted the motion for directed verdict on the grounds that no reasonable jury could find that Barr's alleged negligence caused damages to the Morters. (App. P1) The Court believed that the jury could only speculate as to what would have happened if the case had been properly prepared. (App. P5)

No evidence was produced that the insurer would have paid more money had an offer been made earlier or had the demand been better packaged. (App. P5) The insurer's counsel testified that the company would not have paid more than what was offered at mediation. (App. P5) Such testimony was knowingly false, however, because the insurer had subsequently made three separate offers which totaled $597,500.00. The Court noted that Tessier's opinion was received only for showing how a reasonable plaintiff's attorney would value the case and that it could not be used as evidence of what the insurer might offer in settlement or what a jury might award. (App. P7-8) The arbitrator's award was the only objective evidence of the value of the case. (App. P8) Judgment in favor of Barr and

TIG was subsequently entered by Judge Franke on July 16, 2001.[2]

C. Trial Court Frivolity Proceedings

1. Frivolity Determination

On June 22, 2001, Barr and TIG filed a motion for a finding of frivolity and assessment of actual attorney's fees and costs pursuant to Wisconsin Statutes, Sec. 814.025. (App. Q1-2)[3] No allegations of frivolity had been made or suggested prior to the filing of this motion. Due to judicial rotation,[4] Judge Dennis P. Moroney replaced Judge Franke as the presiding judge in this case on August 1, 2001. Judge Franke took no action on the frivolity motion prior to being rotated.

On September 27, 2001, Judge Moroney heard arguments on the frivolity motion. In a decision entered on October 18, 2001, Judge Moroney ruled that all of the Morters' claims were frivolous. (App. B1-6) The Court concluded that Barr could not have been responsible for any perceived jury trial deprivation. (App. B3-4) Although the original jury trial date had been canceled, Barr was terminated before a new date could be set. (App. B4) The

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[2] The Morters appealed from the trial court's summary judgment and directed verdict decisions. In an unpublished decision dated April 30, 2002, the Wisconsin Court of Appeals affirmed the lower court's decisions. The Wisconsin Supreme Court denied review with respect to such decisions. Because of the timing of the frivolity determination in this case, such decision was not part of Mr. Morters' appeal with respect to the merits.

[3] Such statute is reproduced at App. F1-2.

[4] Judicial rotation is standard practice in Wisconsin.

decision to arbitrate prevented a jury trial in any event. (App. B4)

The Court believed the conflict of interest claim had been lost because of Judge Kieffer's determination that there was no conflict of interest. (App. B4) A reasonable attorney should have known that filing this claim again was frivolous. (App. B4) The insurance claims were found to be frivolous based on the failure to respond to that portion of the summary judgment motion. (App. B4)

As to the delay in filing claim, the Court ruled, based on *Schlomer v. Perina*, 169 Wis. 2d 247, 253, 485 N.W. 2d 399 (1992), that delay alone cannot cause damages unless it is probable that the delay caused a loss of a witness, the passing of a statute of limitations, or similar results. (App. B4-5) No such problems were present here, and the Court believed no evidence was presented to establish that any filing delay caused damage to the Morters. (App. B4-5)

When addressing the claim that Barr was negligent in handling the case by failing to request full policy limits, the Court was convinced that the Morters had failed to show any damage. (App. B5) The arbitration award of $557,000.00 stood as the final value of the case. (App. B5) No matter what Barr would have requested, the Morters would only have been entitled to the value of the case as determined in arbitration. (App. B5)

The Court believed the claim against Barr for failing to prepare and present the Morters' claim to the insurer was lost from the beginning. (App. B5) According to the Court, the Morters should have known there was no damage and pursuing this claim was frivolous. (App. B5)

2. Assessment of Fees

At hearings held on January 3, 2002 and April 29, 2002, the Court heard testimony regarding the assessment of fees. Barr's attorney's fees and costs for defending these actions totaled $40,245.43. The Morters presented expert testimony indicating that Barr should receive no fees due to his failure to mitigate damages and act reasonably. Ronald discussed the various expert opinions which led him to believe that the Morters had a valid claim against Barr. None of these opinions indicated that pursuing such litigation was frivolous or meritless.

The Court believed Mr. Morters was as culpable as his attorney in prosecuting this case. Judge Moroney wished that the frivolity matter had been addressed earlier and ruled that there should have been earlier notice that it was being treated as a frivolous claim. The Court assessed the sum of $20,000.00 which was apportioned equally between Ronald and his attorney. (App. D2) An order for judgment and separate judgments in the amount of $10,000.00 each were entered. (App. C1-2, D1-2)

D. Court of Appeals Proceedings

Ronald commenced this appeal from the frivolity determination and the assessment of fees against him on September 11, 2002. In his appellate brief, Ronald set forth the applicable standards of review for reviewing frivolity determinations in Wisconsin. (App. H2-3) Frivolity inquiries involve a mixed question of law and fact. *State v. State Farm Fire & Cas. Co.*, 100 Wis. 2d 582, 601-602, 302 N.W. 2d 827 (1981). The findings of the circuit court and reasonable inferences drawn are questions of fact which will not be upset unless against the great

weight and preponderance of the evidence. *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 236, 517 N.W. 2d 658 (1994), citing *Sommer v. Carr*, 99 Wis. 2d 789, 792, 299 N.W. 2d 856 (1981) and *Robertson-Ryan v. Pohlhammer*, 112 Wis. 2d 583, 590, 334 N.W. 2d 246 (1983). Whether the facts fulfill the legal standard of frivolousness is a question of law which is reviewed independently of the conclusions of the lower courts. *State Farm*, 100 Wis. 2d at 602 and *Stern*, 185 Wis. 2d at 236. (App. H2) Ronald also cited numerous Wisconsin cases[5] defining frivolity and distinguishing it from a lack of success on the merits. (App. H2-3)

Ronald then presented numerous arguments which demonstrated trial court error. These arguments included 1) the trial court's failure to evaluate his jury trial claim in light of well established Wisconsin case law regarding causation, 2) the absence of any controlling case law holding that an arbitration award foreclosed a subsequent lawsuit for professional negligence and breach of contract, and 3) Wisconsin case law which suggested that the arbitration award would not preclude such lawsuit. (App. H3-10) Mr. Morters also pointed out Judge Moroney's violation of "law of the case" principles and the differing views of Judges Franke and Moroney with respect to the public policy considerations involved. (App. H10-16) Alternatively, Ronald argued that no fees should be awarded because Barr failed to mitigate his costs and provide timely notice of frivolity. (App. H16) Ronald urged the Court to adopt a provision similar to that contained in Rule 11(c) of the Federal Rules of Civil Procedure which

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[5] Such cases will be discussed in the Argument section.

requires advance notice of a frivolity claim and an opportunity to withdraw the claim before a motion for sanctions may be filed. (App. H16-17)

In affirming the frivolity determination, the Court of Appeals' reasoning consisted of one paragraph agreeing with the trial court's position and asserting that Mr. Morters should have known his positions were frivolous. (App. A8) The Court merely stated that Mr. Morters should have known the facts necessary to satisfy the elements of their claims did not exist or could not be developed. (App. A8) The Court concluded that such claims were frivolous. (App. A8) There was no independent discussion of the individual claims themselves or Mr. Morters' arguments. The Court of Appeals failed to set forth any independent legal analysis as to why Ronald's claims were frivolous. (App. A8)

The Court rejected Mr. Morters' alternative argument that the award herein should have been zero because Barr and TIG failed to mitigate their damages and provide timely notice of frivolity. (App. A8-10) In the Court's view, Morters failed to demonstrate how the respondents needlessly protracted the litigation. (App. A9)

E. Supreme Court Proceedings

In his Petition for Review with the Wisconsin Supreme Court, Mr. Morters reiterated the applicable standards for evaluating frivolity determinations. (App. G2, 5-6) Ronald advised the Court that there was no independent discussion of his claims or arguments by the Court of Appeals. (App. G2, 6-7) He believed the Court of Appeals had an institutional duty to independently evaluate and discuss his claims when the allegations of trial court error

had a reasonable basis under Wisconsin law and there was no controlling case law regarding the effect of arbitration which would preclude his claims. (App. G3, 6-7) Mr. Morters urged the Court to grant review so as to establish clear guidelines requiring the lower courts to adhere to the de novo standard of review and conduct a truly independent analysis of the underlying legal question. (App. G3, 7)

The Wisconsin Supreme Court denied Ronald's Petition for Review in its June 12, 2003 order. (App. E1, 2) The Supreme Court's refusal to remedy the Court of Appeals' departure from the appropriate standards of appellate review has effectively deprived Ronald of appellate due process and equal protection of the law. By virtue of the arguments presented in Ronald's Petition for Review and the inaction of the State of Wisconsin's highest court, the deprivation of Ronald's constitutional rights was timely and properly raised and is now properly within the jurisdiction of this Court for review on a writ of certiorari.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

I. THE WISCONSIN COURT OF APPEALS' FAILURE TO ADHERE TO WISCONSIN'S UNIFORM STANDARDS OF APPELLATE REVIEW IN REVIEWING THE FRIVOLITY DETERMINATION IN THIS CASE AND THE WISCONSIN SUPREME COURT'S FAILURE TO RECTIFY THIS ERROR HAVE VIOLATED RONALD W. MORTERS' RIGHTS TO EQUAL PROTECTION OF THE LAW AND DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. Introduction

The Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits the States from depriving any person of life, liberty, or property without due process of law, and the Equal Protection Clause forbids the States from denying "to any person within its jurisdiction the equal protection of the laws." Ronald's case involves a violation of appellate standards of review and appellate due process by the Wisconsin courts. In the following discussion, Ronald will demonstrate that the decisions of the Wisconsin Court of Appeals and Wisconsin Supreme Court have effectively deprived him of his constitutional rights of due process and equal protection under the laws. Since the Wisconsin courts are an arm of the State and the assessment of frivolity costs is

punitive in nature,[6] the requisite state action necessary to invoke the protection of the Fourteenth Amendment is certainly present.

B. Constitutional Protection of Appellate Rights

The Supreme Court has recognized that *if a full and fair trial on the merits is provided*, the Due Process Clause does not require a State to provide appellate review. See *Lindsey v. Normet*, 405 U.S. 56, 77, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972), *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 100 L. Ed. 891 (1956) and *District of Columbia v. Clawans*, 300 U.S. 617, 627, 57 S. Ct. 660, 81 L. Ed. 843 (1937). When the State does provide an appeal, however, *it cannot be granted to some litigants and capriciously or arbitrarily denied to others*. See *Lindsey*, 405 U.S. at 77, *Griffin*, 351 U.S. at 18, and *Smith v. Bennett*, 365 U.S. 708, 81 S. Ct. 895, 6 L. Ed. 2d 39 (1961). In a plurality opinion in *Griffin*, the Court noted that ". . . at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations." *Griffin*, 351 U.S. at 18. Once a State affords appellate relief, the State may not "bolt the door to equal justice." *Griffin*, 351 U.S. at 24 (Justice Frankfurter concurring in judgment).

In *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966), the Court recognized that *once appellate avenues are established, they must be free of*

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[6] *Tigerton v. Minniecheske*, 211 Wis. 2d 777, 785, 565 N.W. 2d 586 (Ct. App. 1997) recognized the statute's punitive purpose.

unreasoned distinctions that can only impede open and equal access to the courts. The Court has insured the protection of the appellate rights of indigent criminal defendants in cases such as *Griffin* and *Douglas v. California*, 372 U.S. 353, 357, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). Due process of law protects against arbitrary action. *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) and *Nebbia v. People of New York*, 291 U.S. 502, 537, 54 S. Ct. 505, 78 L. Ed. 940 (1934). In *Smith v. Robbins*, 528 U.S. 259, 276, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000), the Court discussed how the Equal Protection and Due Process Clauses converge to require effective appellate review for indigent defendants. These Clauses also converge to protect Ronald's appellate rights.

C. Appellate Relief in Wisconsin

In their wisdom, the people of the State of Wisconsin recognized the importance of appellate review. Article 7, Sec. 3(2) of the Wisconsin Constitution confers appellate jurisdiction on the Wisconsin Supreme Court over all courts, and Sec. 3(3) provides that the Supreme Court may review judgments and orders of the Court of Appeals. Article 7, Sec. 5(3) gives the Court of Appeals appellate jurisdiction in their respective districts. The right to appellate review is further protected by Article 1, Sec. 9, of the Wisconsin Constitution which provides that every person is entitled to a remedy in the laws for his injuries. In *Metzger v. Wisconsin Dept. of Taxation*, 35 Wis. 2d 119, 129, 150 N.W. 2d 431 (1967), the Wisconsin Supreme Court noted that the right/remedy provision did not entitle litigants to the exact remedy they desire but merely to their day in court.

Acting in accordance with the Constitutional mandate, the Wisconsin legislature determined that a dissatisfied litigant should have one appeal as of right with an opportunity to seek discretionary review thereafter in the Wisconsin Supreme Court. Sec. 808.03(1) of the Wisconsin Statutes gives litigants an appeal as of right to the Wisconsin Court of Appeals from a final judgment or order of a circuit court. Secs. 808.10 and 809.62 authorize discretionary review of decisions of the Court of Appeals by the Wisconsin Supreme Court.

D. Similar Appellate Relief in Other Jurisdictions

Other jurisdictions have recognized the importance of appellate review and have enacted similar systems. Article III, Sec. 2 of the United States Constitution conferred appellate jurisdiction in certain types of cases on the Supreme Court. Congress enacted 28 U.S.C. § 1291 which gives the United States Court of Appeals jurisdiction over appeals from all final decisions of the federal district courts. Rule 3 of the Federal Rules of Appellate Procedure outlines the procedure for taking an appeal as of right from the decision of a district court. 28 U.S.C. § 1254 then provides for discretionary review of Court of Appeals' decisions by the United States Supreme Court by writ of certiorari. Supreme Court Rules 10, 12, 13, and 14 set forth the considerations and procedures for filing a petition for writ of certiorari.

A small sampling reveals that other states have recognized the importance of granting an appeal as of right to litigants. Minnesota, for example, has a system which gives an appeal as of right to its Court of Appeals

with discretionary review of Court of Appeals' decisions by the Minnesota Supreme Court. See Rules 103.03 and 117 of the Minnesota Rules of Civil Appellate Procedure. South Carolina provides for an appeal to its Court of Appeals and discretionary review by the South Carolina Supreme Court. See South Carolina Appellate Court Rules 201 and 226 and Sec. 18-1-30 of the Code of Laws of South Carolina. Similar arrangements are found in Massachusetts and California. See Rules 3 and 27.1 of the Massachusetts Rules of Appellate Procedure and Rules 1 and 28 of the California Rules of Court. The requirement of an appeal as of right is undoubtedly rooted in concepts of fundamental fairness which recognize that litigants must be afforded the right to seek redress from the *erroneous decisions of lower courts*.

E. The De Novo Review Standard for Questions of Law

A vital principle of appellate due process which has evolved in Wisconsin is the standard of review for questions of law. The Wisconsin courts have recognized that legal questions are the province of the appellate court and reviewable ab initio. See *Board of Regents v. Wisconsin Personnel Commission*, 103 Wis. 2d 545, 551, 309 N.W.2d 366 (Ct. App. 1981), *Wisconsin Bingo Supply & Equipment Co., Inc. v. Wisconsin Bingo Control Bd.*, 88 Wis. 2d 293, 308, 276 N.W. 2d 716 (1979), and *Jaeger Baking Co. v. Kretschmann*, 96 Wis. 2d 590, 594, 292 N.W. 2d 622 (1980). Whether the facts fulfill a particular legal standard is a question of law. See *Nottelson v. ILHR Department*, 94 Wis. 2d 106, 116, 287 N.W. 2d 763 (1980). As noted earlier, whether the facts fulfill the legal standard of frivolousness

is a question of law in Wisconsin which is reviewed independently of the conclusions of the trial court. *State Farm*, 100 Wis. 2d at 602 and *Stern*, 185 Wis. 2d at 236.

The de novo standard of review for legal questions and conclusions of law is followed in the federal system and in numerous other jurisdictions. See for example, *United States v. Singer Mfg. Co.*, 374 U.S. 174, 192-193, 83 S. Ct. 1773, 10 L. Ed 2d 823 (1963), *Murphy v. Turner*, 426 F. 2d 422, 423 (10th Cir. 1970), *Campana Corp. v. Harrison*, 114 F. 2d 400, 405-406 (7th Cir. 1940), *Crocker National Bank v. City and County of San Francisco*, 49 Cal. 3d 881, 264 Cal. Rptr. 139, 782 P. 2d 278, 281 (Cal. 1989), *Gilbert v. El Paso Co.*, 575 A. 2d 1131, 1141-1142 (Del. Supr. 1990), *Watson v. National Surety Corp.*, 468 N.W. 2d 448, 450 (Iowa 1991), *Griffin v. State*, 14 Kan. App. 2d 803, 799 P. 2d 521, 523 (Kan. App. 1990), *Norfolk Elec. v. Fall River Housing Auth.*, 417 Mass. 207, 629 N.E. 2d 967, 971 (Mass. 1994), and *Laramie v. Hysong*, 808 P. 2d 199, 202 (Wyo. 1991).

The de novo standard of review contemplates a *fresh and independent analysis* of the facts and arguments by an appellate court when reviewing a question of law. The rationale for standards of review and the importance of adherence to them is explained in the following passage from Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* (3rd ed. 2002):

> "The concept of standard of review is based on several factors. First, the concept recognizes that trial judges and juries are in a better position to consider and decide some issues, whereas reviewing courts are in a better position to handle others. In addition, *standards of review promote uniformity* by telling appellate courts what

> their function is, conserve judicial energy by providing a framework for analyzing appeals, *and limit the potential for compounding error with new error* by focusing appellate review within specific boundaries." (Chapter 3, pages 8 & 9) [Emphasis added]

The promotion of uniformity also serves to guarantee equal protection and guard against arbitrariness to litigants in the appellate system.

F. The Need for Supreme Court Review

In *Chandler v. Florida*, 449 U.S. 560, 570, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981), the Court recognized that it has no supervisory jurisdiction over state courts and its review of state court judgments is confined to evaluating them in relation to the Federal Constitution. An analysis of the actions of the Wisconsin courts in relation to the Equal Protection and Due Process Clauses is precisely what this case involves. According to Supreme Court Rule 10(c), one consideration for granting a writ of certiorari is when a state court has decided an important question of federal law in a way that conflicts with relevant decisions of the Supreme Court.

The Wisconsin Court of Appeals' departure from uniform standards of appellate review and the Wisconsin Supreme Court's sanctioning of the same certainly conflicts with the Court's decisions cited earlier which protect due process and guarantee equal protection at the appellate level. The decisions herein are characterized by arbitrariness and a lack of uniformity. Although Wisconsin's appellate statutes and standards of review are

nondiscriminatory on their face, laws which are nondiscriminatory on their face may be applied in such a way as to violate the Equal Protection Clause. See concurring opinion of Justice Douglas in *Furman v. Georgia*, 408 U.S. 238, 257, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374, 6 S. Ct. 1064, 30 L. Ed. 220 (1886). The failure to follow the de novo standard in this case discriminates against Mr. Morters.

When considering whether to grant this petition, the Court should also realize that the impact of a decision herein would extend beyond Wisconsin. Since the federal system and numerous other States provide for an appeal as of right and utilize the de novo standard of review for legal questions, a decision by the Court would remind them that they too must adhere to their own standards to guard against arbitrariness and insure equal protection in the appellate process. Mr. Morters will now outline the violation of the de novo standard which effectively deprived him of an appeal as of right.

G. Discussion of Violation of De Novo Standard and Deprivation of Constitutional Rights

1. Sec. 814.025(3)(b) and Case Law Definitions of Frivolity

This frivolity finding is based on Sec. 814.025(3)(b), which requires the Court to find the following in order to find an action to be frivolous:

> "The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law *or*

> *equity* and could not be supported by a good faith argument for an extension, modification or reversal of existing law." (App. F1-2) [Emphasis added]

Aside from requiring de novo review of frivolity questions, stringent standards have evolved for evaluating frivolity claims in Wisconsin. When a frivolous action claim is made, all doubts are resolved in favor of finding a claim *nonfrivolous*. *Stern*, 185 Wis. 2d at 335 and *In Matter of Estate of Bilsie*, 100 Wis. 2d 342, 350, 302 N.W. 2d 508 (Ct. App. 1981). A claim is not frivolous merely because there is a failure of proof. *Stern*, 185 Wis. 2d at 243. A claim is also not frivolous merely because it was later shown to be incorrect or because it lost on the merits. *Stern*, 185 Wis. 2d at 243-244, citing *Sommer*, 99 Wis. 2d at 797.

The failure to survive summary judgment does not mean that the action is frivolous. *Stern*, 185 Wis. 2d at 244, footnote 9. When analyzing frivolity cases, the issue is not whether a party can or will prevail but whether the party's position is *so indefensible* that it is frivolous and the party should have known it. *Stoll v. Adriansen*, 122 Wis. 2d 503, 515, 362 N.W. 2d 182 (Ct. App. 1984) citing *Sommer*, 99 Wis. 2d at 797. The decisions in *Stern* and *Stoll* provide excellent examples of thorough analysis of frivolity questions and adherence to the de novo standard of review. In both cases, there is independent discussion of the law and the facts which afforded the litigants their right to an appeal.

2. Conclusory Nature of the Court's "Analysis"

In this case, the Court of Appeals' "analysis" of the frivolity issue consisted of one long quotation of the trial court's decision and the following brief paragraph expressing its agreement with the same:

> "We agree with the trial court's analysis of Morters' legal malpractice claims. In each instance, Morters failed to allege sufficient facts that could satisfy the elements of the claim. As the trial court adequately established, Morters and his attorney should have known that the needed facts did not exist or could not be developed. Because Morters or his attorney knew or should have known that the positions taken were frivolous, we conclude that the claims were frivolous under Wis. Stat. § 814.025(3)(b)." (App. A8)

Although Ronald presented four major legal arguments to show his claim was not frivolous, none were addressed by the Court of Appeals. Even though there was no controlling case law which indicated that an arbitration would foreclose Ronald's claim, the Court advanced no legal theory to support the trial court's conclusions. Without any rational basis, Ronald was treated arbitrarily and in a dissimilar manner from other litigants raising legal questions for review. A review of Ronald's legal arguments will demonstrate such unequal treatment.

3. The Failure to Address Causation Law

In affirming the frivolity decision on the jury trial claim based on causal grounds, the Wisconsin Court of Appeals failed to address the issue in light of well established case law regarding causation. Under Wisconsin law,

an accident or injury may be caused by the combined negligence of two or more persons. See Wisconsin Jury Instructions – Civil No. 1500 at App. F2. In Wisconsin, the test for whether negligence is causal is whether that negligence was a substantial factor in causing the injuries. *Merco Distributing Corp. v. Commercial Police Alarm Co., Inc.*, 84 Wis. 2d 455, 458, 267 N.W. 2d 652 (1978).

Under the substantial factor concept of causation, there may be several substantial factors contributing to the same result. *Sampson v. Laskin*, 66 Wis. 2d 318, 326, 224 N.W. 2d 594 (1975). According to *Schnabl v. Ford Motor Co.*, 54 Wis. 2d 345, 353-354, 195 N.W. 2d 602, 198 N.W. 2d 161 (1972), the negligent act need not be the sole factor, the primary factor, but only a substantial factor in causing the injury. Thus, Wisconsin law only required Ronald to demonstrate that Barr's behavior was a substantial factor in causing the loss of a jury trial.

The facts regarding the jury trial claim are undisputed. The trial was scheduled to begin on August 15, 1994, and the Morters wanted a jury trial. (App. I3) Barr had repeatedly tried to convince the Morters to settle, mediate, or arbitrate the case. (App. H5, I3) Sometime before July 23, 1994, Barr and the insurer's counsel secretly agreed to adjourn the jury trial and proceed with mediation. (App. I4) A letter was delivered to the Court on July 23, 1994 requesting such adjournment. (App. I4, 9)

The Morters had not consented to the adjournment and did not know about the request. (App. I4) Unaware that the Morters had not consented to this adjournment, the Court granted the request without the necessity of a hearing because of the strong likelihood that the case would be bumped. (App. I4, 9-10)

The jury trial was rescheduled for July 31, 1995. During the delay, a dispute developed between Ronald and Ann as to whether the case should be decided by a jury or an arbitrator. (App. I5-6) Initially, the Morters agreed to accept arbitration because of Ann's insistence and to prevent further stress to her, but later withdrew their consent. (App. H5-6, I6)

The Morters presented the opinions of Schulz and Tessier that, among other things, Barr was negligent in agreeing to adjourn the August 15, 1994 trial and in representing all of them. (App. J1-4, K1-3) The Morters submitted Dunphy's opinion which valued the case at substantially more than the arbitration award. (App. L1-3) The insurers subsequent offers of settlement also exceeded the arbitration award.

From those facts, a jury could have concluded that Barr's conduct was a substantial factor in delaying the case and causing such internal friction that the Morters felt compelled to arbitrate. The foregoing argument was presented to both the Wisconsin Court of Appeals and the Wisconsin Supreme Court,[7] but neither addressed the same. No effort was made to explain why Barr's conduct could not have been a substantial factor in causing the loss. Neither Court attempted to explain how the Morters' failure to prove this claim rose to the level of frivolity.

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[7] (App. G7-9, H3-7)

4. The Failure to Examine the Effect of Arbitration

The trial court believed that the arbitration proceedings foreclosed the jury trial claim, but cited no legal principles to support its opinion. (App. B4-5) *Although there is no controlling Wisconsin case law as to the effect of an arbitration on a subsequent suit for malpractice*, the Court of Appeals inexplicably ignored the issue.

While Judge Moroney could believe that the arbitration award would bar such suits, the Morters could argue in good faith to the contrary since Barr was not party to the arbitration agreement, and had no derivative interest founded on the agreement. Barr shared no mutuality of interest with the Waukesha County defendants. The Morters alleged a reasonable basis for their damages, i.e. the difference between what they could prove a jury would have awarded and the amount the arbitrator awarded. They did not seek to duplicate previous damages.

The ruling in *Dane County v. Dane County Union Local 65*, 210 Wis. 2d 267, 565 N.W. 2d 540 (Ct. App. 1997) lends support to the Morters' position. In *Dane County*, the Court examined whether one arbitrator's decision can have a preclusive effect on the ability of a subsequent second arbitrator. The Court looked at the doctrines of issue and claims preclusion and concluded as follows:

> "Where, at a minimum, the claim, or the issue necessarily decided in the first arbitration is the same as in the second arbitration, the parties are the same, the parties have had a full opportunity to argue their respective positions to the first arbitrator and the parties have not agreed to resubmit the claim or the issue necessarily decided in the first arbitration to a second arbitration,

> then, the preclusion doctrines may be applied by an arbitrator or by a reviewing court." *Dane County*, 210 Wis. 2d at 279-280.

Due to differences in the parties and the nature of the claims, the arbitration could not have had a preclusive effect on the Milwaukee County litigation. Even if wrong, the Morters' position had a reasonable basis. *Despite the absence of any controlling case law and the existence of law which supported Ronald's position*, the Wisconsin courts failed to address the arbitration issue presented to them.[8]

5. No Discussion Regarding Law of the Case

Because Judge Kieffer had determined that there was no conflict of interest, Judge Moroney found the conflict of interest claim to be frivolous based on issue preclusion. (App. B4) Judge Franke, however, granted summary judgment on this claim due to a lack of causal connection between the alleged negligent acts and any loss to the Morters. (App. M2, N6-8) The Court rejected Barr's issue preclusion argument and ordered that "[d]efendants' motion is denied insofar as it contends that plaintiffs' claims are barred by issue preclusion." (App. M1, N1-5)

Regardless of whether Judge Moroney disagreed with Judge Franke's ruling, he was bound by it pursuant to the doctrine of "law of the case." See *Beal v. First Fed. Sav. & Loan Assoc. of Madison*, 90 Wis. 2d 171, 190, 279 N.W. 2d 693 (1979). According to *Black's Law Dictionary*, 4th

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[8] (App. G9-11, H7-10)

Edition (1957), the doctrine expresses a practice of courts generally refusing to reopen what has been decided. The law of the case doctrine is well engrained in Wisconsin law. See for example, *Peterson v. Warren*, 31 Wis. 2d 547, 570, 143 N.W. 2d 449 (1966) and *State v. Brady*, 130 Wis. 2d 443, 447-448, 388 N.W. 2d 151 (1986).

Since Judge Franke had already ruled on the issue preclusion matter, his decision therefore became the law of the case for these proceedings at the Circuit Court level. Thus, such grounds could not be used by Judge Moroney to support his frivolity decision. Although Ronald presented this same argument to the Court of Appeals and Supreme Court,[9] neither Court addressed the same.

6. The Failure to Address Public Policy Considerations

Using the *Schlomer* case cited earlier, the trial court found the delay in filing claim to be frivolous. (App. B4-5) Judge Moroney's reliance on *Schlomer* to support a frivolity decision is strange in light of Judge Franke's treatment of this matter. *Schlomer* held that delay by an attorney alone cannot cause damage unless it is probable that the delay caused a loss of witness, the passing of a statute of limitations, or similar results. *Schlomer*, 169 Wis. 2d at 253. In *Schlomer*, the plaintiff sued his former attorney for negligence alleging delay in filing a lawsuit and loss of use of funds resulting from the delay. *Schlomer*, 169 Wis. 2d at 248-249. The jury found causal negligence and damages, but the Supreme Court denied recovery on public policy

[9] (App. G11-12, H10-12)

grounds because the injury was too remote from the negligence and too out of proportion to the culpability of the negligent tortfeasor. *Schlomer*, 169 Wis. 2d at 254.

Because *Schlomer* involved public policy, Judge Franke denied the portion of Barr's summary judgment motion based thereon as premature and indicated that the contention might be reconsidered after a full record was developed. (App. M1, N11-12) In his directed verdict ruling, Judge Franke accepted the arguments about *Schlomer* but did not base his decision on the same. (App. G13, P1, 4-8) The fact that Judge Franke was initially unsure of the effect of *Schlomer* demonstrates that reasonable minds can differ in their interpretations of the case and its public policy considerations.

According to *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis. 2d 723, 736, 275 N.W. 2d 660 (1979), whether public policy considerations preclude liability is a question of law solely for judicial discretion. Since the exercise of judicial discretion was involved and the original trial judge was initially unsure of the public policy considerations, the Wisconsin Court of Appeals' and Supreme Court's failure to analyze the public policy argument raised by Mr. Morters[10] is inexplicable.

7. The Failure to Consider Other Arguments

Besides ignoring the aforementioned arguments presented by Mr. Morters, the Wisconsin courts neglected

[10] (App. G13-14, H13-16)

to review the negligent handling claims in light of evidence showing that Barr's delay in filing the case and negligent preparation caused him damage. The request for the adoption of a notice provision similar to Rule 11(c) of the Federal Rules of Civil Procedure which requires advance notice of a frivolity claim and an opportunity to withdraw the claim before a motion for sanctions may be filed was also dismissed without comment by the Court of Appeals.

8. Summary

In her dissenting opinion in *Jackson v. Benson*, 2002 WI 90, par 14-28, 255 Wis. 2d 24, 647 N.W. 2d 815 (2002), Chief Justice Abrahamson discussed the problem of insufficient findings and reasoning to justify a frivolity determination. The decision in this case certainly exemplifies this problem. There is no de novo review of the frivolity issue by the Court of Appeals, and the decision is marked by arbitrariness.

Sec. 808.03(1) of the Wisconsin Statutes provides all dissatisfied litigants with *an appeal as of right*, and the aforementioned case law guarantees those appellants raising questions of law *a de novo review*. These principles insure equality, uniformity, and fairness in the appellate process. Mr. Morters' unequal treatment by the Courts on appeal, however, effectively abrogated his right to an appeal. An independent analysis of Ronald's claims, arguments, and legal authority would have shown his action to be meritorious.

CONCLUSION

By failing to rectify the Court of Appeals' error, the Wisconsin Supreme Court has sanctioned a departure from Wisconsin's uniform standards of appellate review and a deprivation of Mr. Morters' Fourteenth Amendment rights to due process of law and equal protection under the law. As the ultimate guardian of Constitutional rights, it now becomes the responsibility of the United States Supreme Court to remedy this violation by granting certiorari in this case. A decision herein will not only benefit Mr. Morters but will serve to protect the rights of appellate litigants in other jurisdictions as well. For the reasons recited in this petition, Ronald W. Morters' petition for writ of certiorari should be granted and it is respectfully requested that the Court grant the same.

Dated at Big Bend, Wisconsin, this 5th day of September, 2003.

Respectfully submitted,

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COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2434

STATE OF WISCONSIN

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Cir. Ct. Nos.
99CV5303 & 00CV1705

IN COURT OF APPEALS
DISTRICT I

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

V.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

SHANNON L. MORTERS,

PLAINTIFF,

V.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order and a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Deininger, JJ.

¶ 1 PER CURIAM. Ronald W. Morters appeals *pro se* from the order granting the defendants' motion for costs and attorney's fees on the grounds that Morters' claims were frivolous under WIS. STAT. § 814.025(3)(b) (2001-02).[1] Morters also appeals from the judgment awarding $20,000 to the defendants.[2] Morters contends: (1) the trial court erroneously concluded that his claims were frivolous under § 814.025(3)(b); and (2) the trial court erred in its assessment of the costs and fees. We affirm.

I. BACKGROUND.[3]

¶ 2 Ronald Morters was involved in a multi-car accident when a driver crossed the center line during a

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[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] A $10,000 judgment was entered against Ronald W. Morters, and a separate $10,000 judgment was entered against his attorney, Robert E. Sutton. Sutton has not appealed his portion of the judgment. Although Morters originally attempted to also appeal his attorney's portion of the judgment, this court dismissed that portion of the appeal on jurisdictional grounds. *Cf. Jadair Inc. v. United States Fire Ins. Co.*, 209 Wis. 2d 187, 194, 562 N.W.2d 401 (1997) (concluding that a fundamental defect existed when a non-lawyer signed a notice of appeal on behalf of a corporation).

[3] A number of facts involved in this appeal are taken from *Morters v. Barr*, No. 01-2011, unpublished slip op. at ¶1-7 (WI App January 14, 2003), and *Morters v. Barr*, No. 01-2011, unpublished slip op. at ¶2-4 (WI App April 30, 2002).

snowstorm and hit his automobile. His wife, Ann, who was following him in a separate automobile, was unable to stop and struck him from behind. Shannon Morters, their granddaughter, was a passenger in Ann's car. All three of the Morters were injured, with Ronald having the most serious injuries.

¶ 3 The Morters and their granddaughter hired Charles Barr as their attorney to commence lawsuits as a result of the accident. Barr filed suits on behalf of the Morters against the driver who had caused the accident, but before a trial could be held, the parties mediated the case. At the mediation session, the other driver's insurance company offered $575,000 to settle all three cases. In addition, at mediation, the subrogated health insurance carrier agreed to reduce its claim and Barr agreed to reduce his fee so that the offer was equivalent to a $771,000 jury verdict.

¶ 4 The Morters rejected the offer, dismissed Barr as their attorney, and hired another law firm. The new law firm stipulated to the cases being decided by arbitration. Unhappy with the decision to arbitrate, the Morters fired the new law firm and hired a third attorney to represent them. At the Morters' direction, this new attorney filed a motion to relieve the Morters from the stipulation sending their cases into arbitration, but later they changed their minds again and chose to proceed with the arbitration, resulting in the dismissal of their cases. The arbitrator determined that the Morters were entitled to only $557,384.17.

¶ 5 Morters and his granddaughter then started legal malpractice suits against Barr,[4] claiming that Barr had a conflict of interest in representing all three Morters; that his actions deprived them of a jury trial; that he was negligent with respect to their worker's compensation claim; that a delay in filing their personal injury case caused them damage; and that he had failed to demand the policy limits or file a statutory offer to settle.[5] During the pendency of these actions, the trial court consolidated the two Morters' lawsuits. Because the plaintiffs had failed to establish any evidence that their conflict-of-interest or jury-trial claims resulted in any discernable monetary damages, the trial court dismissed those claims. With respect to the claims filed with the insurance company, because the evidence revealed that Barr had properly prepared and presented the Morters' claim to the liability insurance company and the insurance company was willing to pay the policy limits, the trial court dismissed this final claim at the close of the plaintiffs' case.

¶ 6 Ronald and Shannon Morters then appealed both the order granting partial summary judgment and the later judgment entered in the defendants' favor. The Morters complained that the trial court: (1) erroneously exercised its discretion in consolidating their two cases; (2) erred in granting partial summary judgment; (3) erroneously exercised its discretion in granting a motion in limine; and (4) erred in directing a verdict for the respondents. The respondents filed a motion requesting frivolous

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[4] Ronald's wife, Ann, died before either suit was filed.

[5] Morters subsequently amended his complaint to add Barr's insurer, TIG Insurance Company, as a party-defendant.

costs on appeal. We affirmed the trial court in all respects. Because the Morters' brief on appeal failed to satisfy the requirements of WIS. STAT. RULE 809.19 (1999-2000), we also awarded the respondents costs and fees, including attorney fees, pursuant to WIS. STAT. RULE 809.83 (1999-2000).

¶ 7 In the trial court, the defendants also moved for costs and attorney's fees on the grounds that the Morters' claims against Barr were frivolous under WIS. STAT. § 814.025(3)(b). The trial court ultimately concluded that each of the Morters' claims was frivolous and ordered Ronald Morters and his attorney, Robert E. Sutton, to pay the defendants $20,000.[6]

II. ANALYSIS.

¶ 8 WISCONSIN STAT. § 814.025 provides that reasonable attorney fees shall be awarded to the defendant when a plaintiff commences or continues a claim that is found to be frivolous. Section 814.025(3)(b) provides that a claim is frivolous if "[t]he party or the party's attorney knew, or should have known, that the action . . . was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." "[A] claim cannot be made reasonably or in good faith . . . if there is no set of facts which could satisfy the elements of the claim, or if

[6] Although Ronald's granddaughter was a party to the lawsuit against Barr, the costs and fees were only levied against Ronald and his attorney. Thus, neither Ronald Morters' granddaughter, nor Attorney Sutton, is a party to this appeal.

the party or attorney knows or should know that the needed facts do not exist or cannot be developed." *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 244, 517 N.W.2d 658 (1994). Furthermore, "[a]n action which initially is not frivolous may become frivolous if the party or his or her attorney learns through discovery or pretrial and trial motions that the action is without any reasonable basis in law or equity and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." *Kelly v. Clark*, 192 Wis. 2d 633, 655, 531 N.W.2d 455 (Ct. App. 1995).

¶ 9 Thus, "[a] finding of frivolousness under WIS. STAT. § 814.025(3)(b) 'is based on an objective standard, requiring a determination of whether the party or attorney knew or should have known that the position taken was frivolous as determined by what a reasonable attorney would have known or should have known under the same or similar circumstances.'" *Osman v. Phipps*, 2002 WI App 170, ¶ 16, 256 Wis. 2d 589, 649 N.W.2d 701 (citing *Riley v. Lawson*, 210 Wis. 2d 478, 491, 565 N.W.2d 266 (Ct. App. 1997)). The determination of what a reasonable attorney knew or should have known presents a question of fact, and we will uphold the trial court's determination unless it is clearly erroneous. *Id.* Whether these facts support a finding of frivolousness, however, presents a question of law subject to our *de novo* review. *Id.*

¶ 10 In the instant case, in a written decision, the trial court ruled that each of Morters' claims were frivolous:

> Plaintiffs' first claim against Barr is an alleged deprivation of a jury trial. This claim is frivolous for many reasons. Although the original trial date was cancelled, Mr. Barr was terminated in his representation before a new trial

date could be set. In addition, the decision to submit to arbitration prevented any jury trial anyway. The arbitration decision occurred after Mr. Barr's representation was terminated. It is abundantly clear that Mr. Barr could not have been responsible for any perceived deprivation of a jury trial. Accordingly, this claim is frivolous.

Plaintiffs' next claim that Mr. Barr had a conflict of interest in representing all of the plaintiffs. This issue was specifically addressed previously in [a fee hearing] and [the court] found that there was no conflict of interest. This claim had been litigated and lost, and a reasonable attorney should have known that filing this claim against Barr again was frivolous.

Plaintiffs also made a claim against Mr. Barr relating to life insurance and [a] worker's compensation claim. Defendants previously filed a motion for summary judgment on this claim, and plaintiffs never responded. Defendants were granted their motion for summary judgment. The failure to even contest the summary judgment motion on this claim makes it clear that this claim was frivolous and should never have been brought.

Plaintiffs claim that Mr. Barr's delay in filing the case caused them damage. Delay by an attorney alone cannot cause damages unless it is probable that the delay caused a loss of a witness, the passing of the statute of limitations, or similar results. *Schlomer v. Perina*, 169 Wis. 2d 247, 253, 45 N.W.2d 399, 402 (1992).... [P]laintiffs presented no evidence to establish that any delay in filing by Mr. Barr caused them damage. A total lack of evidence to support a claim necessitates a finding of frivolousness.

> Finally, plaintiffs claim Mr. Barr was negligent in handling their case by failing to request the full policy limits from the insurance company. Plaintiffs would have this court believe that the fact that Mr. Barr failed to request the insurance policy limit of $1,000,000 caused them damage. However, there are two parts to an actionable claim, and even if Barr was negligent, plaintiffs have failed to show any damage. In arbitration, the value of the case was determined to be $557,000. Plaintiffs have not moved to modify, vacate, or otherwise modify this arbitration award. The arbitration value stands as the final value of this case. . . . No matter what dollar amount Mr. Barr [would have] requested, plaintiffs would still only be entitled to what the case is worth – $557,000.
>
> . . . . Plaintiffs should have known that there was no damage, and pursuing its [sic] claim was frivolous.

¶ 11 We agree with the trial court's analysis of Morters' legal malpractice claims. In each instance, Morters failed to allege sufficient facts that could satisfy the elements of the claim. As the trial court adequately established, Morters and his attorney should have known that the needed facts did not exist or could not be developed. Because Morters or his attorney knew or should have known that the positions taken were frivolous, we conclude that the claims were frivolous under WIS. STAT. § 814.025(3)(b).

¶ 12 Morters also contends that the assessment of costs and fees against him was inappropriate. He argues, "[N]o award should have been made or the award should have been nominal. . . . " Morters believes that this position

is consistent with the supreme court's holding in *Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 575-79, 597 N.W.2d 744 (1999). We disagree.

¶ 13 The purpose of the frivolous claim and appeal statutes is to deter litigants from commencing or continuing frivolous actions and to punish those who do. *Tigerton v. Minniecheske*, 211 Wis. 2d 777, 785, 565 N.W.2d 586 (Ct. App. 1997). A court may impose sanctions upon a litigant – even onerous conditions – so long as they assist the court in deterring frivolous claims and are not so burdensome as to deny the litigant meaningful access to the courts. *See id.*

¶ 14 In *Jandrt*, the supreme court stated that "in determining the appropriate amount of fees and expenses, a court should 'reflect upon equitable considerations in determining the amount of the sanction.'" *Jandrt*, 227 Wis. 2d at 577 (citation omitted). Logic dictates that reasonable sanctions make a party whole by including all the costs and fees associated with defending against the frivolous claims. *Id.* The supreme court also stated that "[i]n some circumstances, '[a] duty of mitigation exists, and a [trial] court should ensure that the party requesting fees has not needlessly protracted the litigation.'" *Id.* at 578 (citation omitted).

¶ 15 Based on *Jandrt*, Morters concludes that the costs and fees assessed against him were too severe, because the defendants needlessly protracted the litigation. Unfortunately, Morters argument indicates that he *still* has not learned his lesson regarding the development of a solid argument to support his claims. Morters makes a number of bald assertions, but never adequately demonstrates how the defendants *needlessly* protracted the litigation. Rather, this appeal and the case below validate

the very existence of the frivolous claim and appeal statutes. Unfortunately, Morters remains undeterred from commencing or continuing frivolous actions. Accordingly, the trial court was justified in sanctioning Morters. Because we conclude that the amount of the judgment entered against Morters was reasonable, we affirm.

¶ 16 Based on the foregoing rationale, the trial court is affirmed.

By the Court. – Order and judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

STATE OF WISCONSIN **CIRCUIT COURT** **MILWAUKEE COUNTY**

CIVIL DIVISION

RONALD W. MORTERS
Plaintiff,

Case No. 99-CV-005303

v.

CHARLES H. BARR
Defendants.

SHANNON L. MORTERS
Plaintiff,

Case No. 00-CV-001705

v.

CHARLES H. BARR and TIG INSURANCE COMPANY
Defendants.

DECISION AND ORDER

(Filed Oct. 18, 2001)

STATEMENT OF THE CASE

In separate but consolidated complaints, Ronald Morters and his granddaughter, Shannon Morters, allege that in 1991 they retained attorney Charles Barr to represent them with respect to personal injury claims arising out of a motor vehicle accident, and that Barr was negligent in handling their claims. Ronald Morters' wife was also injured in the accident and was represented by attorney Barr, but she is deceased and is not a plaintiff in this legal malpractice action. Specifically, the complaints alleged that Barr was negligent in failing to file the cases sooner, he ignored a conflict of interest between Ronald and Shannon, he mishandled certain matters relating to

plaintiff's life insurance, and he requested that the trial date be adjourned without their consent. Ronald Morters additionally alleged that Mr. Barr was negligent in that he failed to make a demand on the insurance company and file a statutory offer of settlement.

Because the plaintiff failed to establish any evidence to suggest that the date of filing, the adjournment of the jury trial, the mishandled life insurance, or the "conflict of interest" claims resulted in any discernible monetary damage, the court granted summary judgment on those theories of negligence. The only theory left for trial was that if Mr. Barr had properly prepared and presented the Morters' claims to the liability insurance company, the insurance company would have paid the policy limits. The court later granted defendants' motion to dismiss at the close of plaintiffs' evidence for the failure to establish an injury.

ANALYSIS

Defendants have moved for attorneys fees on the grounds that the plaintiffs' claims were frivolous under § 814.025 of the Wisconsin Code. Plaintiffs respond that defendants' motion is frivolous and move for attorneys fees as well.

A claim is frivolous under § 814.025(3)(b) if the party or party's attorney knew or should have known that the claim was "without any reasonable basis in law or equity." *Stern v. Thompson, Ltd.*, 185 Wis. 2d 220, 240-41, 517 N.W.2d 658, 665 (1994). The standard is whether a party or his attorney knew or should have known that the position taken was frivolous and in the case of an attorney it is determined by what a reasonable attorney would have

known or should have known under the same or similar circumstances. *Id.* The issue is not whether a party can or will prevail but whether the party's position is so indefensible that it is frivolous and that the party should have known it. *Stoll v. Adriansen*, 122 Wis. 2d 503, 515, 362 N.W.2d 182, 189 (Ct. App. 1984).

A claim cannot be made reasonably or in good faith even though possible in law, if there is no set of facts which can satisfy the elements of the claimor if the party or attorney knows or should know that the needed facts do not exist or cannot be developed. *Stern* 185 Wis. 2d at 245, 517 N.W.2d at 667. If the party or attorney knows or should reasonably know that the facts necessary to meet the required elements of an allegation are not present and cannot be produced, then there is no cause of action. *Id.* When there is a total lack of evidence necessary to prove the claim asserted, this would lead a reasonable party to conclude under the facts of the case that the assertion of such claim would be frivolous. *Id.*

Plaintiffs argue that a motion for frivolous claims cannot be made after a judgment is signed. While it is true that a motion for frivolous claims is not timely if made after the final judgment is signed, it is not true that a ruling cannot be made on a motion for frivolous claims after judgment if the motion is made before the final judgment. If a motion for frivolousness is filed before judgment is entered, a court may, in its discretion, rule on the motion after judgment is entered. *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 286, 528 N.W.2d 502, 506 (Ct. App. 1995).

Plaintiffs' first claim against Mr. Barr is an alleged deprivation of a jury trial. This claim is frivolous for many

reasons. Although the original trial date was cancelled, Mr. Barr was terminated in his representation before a new trial date could be set. In addition, the decision to submit to arbitration prevented any jury trial anyway. The arbitration decision occurred after Mr. Barr's representation was terminated. It is abundantly clear that Mr. Barr could not have been responsible for any perceived deprivation of a jury trial. Accordingly, this claim is frivolous.

Plaintiffs next claim that Mr. Barr had a conflict of interest in representing all of the plaintiffs. This issue was specifically addressed previously in Judge Kiefer's court in Waukesha County, and Judge Kiefer held that there was no conflict of interest. This claim had previously been litigated and lost, and a reasonable attorney should have known that filing this claim against Mr. Barr again was frivolous.

Plaintiffs also made a claim against Mr. Barr relating to life insurance and worker's compensation claim. Defendants previously filed a motion for summary judgment on this claim, and plaintiffs never responded. Defendants were granted their motion for summary judgment. The failure to even contest the summary judgment motion on this claim makes it clear that this claim was frivolous and should never have been brought.

Plaintiffs claim that Mr. Barr's delay in filing the case caused them damage. Delay by an attorney alone cannot cause damages unless it is probable that the delay caused a loss of a witness, the passing of the statute of limitations, or similar results. *Schlomer v. Perina*, 169 Wis. 2d 247, 253, 45 N.W.2d 399, 402 (1992). There was no statute of limitations problem, as Mr. Barr filed the complaint

nine months before the statute of limitations was to run. Also, plaintiffs presented no evidence to establish that any delay in filing by Mr. Barr caused them damage. A total lack of evidence to support a claim necessitates a finding of frivolousness.

Finally, plaintiffs claim Mr. Barr was negligent in handling their case by failing to request the full policy limits from the insurance company. Plaintiffs would have this court believe that the fact that Mr. Barr failed to request the insurance policy limit of $1,000,000 caused them damage. However, there are two parts to an actionable claim, and even if Barr was negligent, plaintiffs have failed to show any damage. In arbitration, the value of the case was determined to be $557,000. Plaintiffs have not moved to modify, vacate, or otherwise modify this arbitration award. The arbitration judgment stands as the final value of this case. It makes no difference what amount of monetary compensation Mr. Barr would have asked for since the actual value of the case is $557,000. Even if it were true that Mr. Barr had not asked for the insurance policy limit, there is still no damage to the plaintiffs. No matter what dollar amount Mr. Barr requested, plaintiffs would still only be entitled to what the case is worth – $557,000.

Plaintiffs' claim against Mr. Barr for failing to adequately prepare and present the Morters' claim to the insurance company was lost from the very beginning. Plaintiffs should have known that there was no damage, and pursuing its claim was frivolous.

THEREFORE, it is hereby ordered that Charles H. Barr's and TIG Insurance Company's motion for frivolous claims is granted and Charles H. Barr's and TIG Insurance

Company's motion for actual reasonable attorney's fees and costs is granted to be paid by the plaintiffs and/or its attorneys. The defendants should provide a detailed accounting to the Court evidencing such attorneys fees being requested under the five (5) day rule, and an Order for Judgment covering such attorney fees.

Dated at Milwaukee, Wisconsin this 18th of October, 2001.

BY THE COURT:

/s/ Dennis P. Moroney

Honorable Dennis Moroney
Circuit Court Judge
Branch 20
Case No. 99-CV-005303
00-CV-001705

STATE OF WISCONSIN	CIRCUIT COURT	MILWAUKEE COUNTY

RONALD W. MORTERS,

Plaintiff,

-vs-

CHARLES H. BARR and TIG INSURANCE COMPANY,

Defendants.

CASE NO. –99-CV-005303

CASE CODE NO. - 30703

SHANNON L. MORTERS,

Plaintiff,

-vs-

CHARLES H. BARR and TIG INSURANCE COMPANY,

Defendants.

CASE NO. –00-CV-001705

CASE CODE NO. - 30703

JUDGMENT IN FAVOR OF DEFENDANTS, CHARLES H. BARR AND TIG INSURANCE COMPANY and AGAINST RONALD W. MORTERS

(Filed Jul. 29, 2002)

Pursuant to the Order for Judgment on file granting the motion of the defendants, Charles H. Barr and TIG Insurance Company, for frivolous claims costs ~~pursuant to Sec. 814.025, Wis. Stats.~~ [not per signed order]; and the court having issued a written order that judgment be entered in favor of these defendants and against the plaintiff, Ronald W. Morters, in the sum of Ten Thousand and 00/100 ($10,000.00) Dollars,

NOW, THEREFORE, IT IS HEREBY ADJUDGED that Attorney Charles H. Barr and his professional liability insurer, TIG Insurance Company, shall have judgment against the plaintiff, Ronald W. Morters, in the amount of Ten Thousand and 00/100 ($10,000.00) Dollars.

Judgment entered and docketed
JUL 29 2002

[handwritten note]

BY THE COURT
JOHN BARRETT
CLERK OF
CIRCUIT COURT

BY /s/ Diane Gawronski
JUDGMENT CLERK

STATE OF WISCONSIN	CIRCUIT COURT	MILWAUKEE COUNTY

RONALD W. MORTERS,

Plaintiff,

-vs-

CHARLES H. BARR and TIG INSURANCE COMPANY,

Defendants.

CASE NO. –99-CV-005303

CASE CODE NO. - 30703

SHANNON L. MORTERS,

Plaintiff,

-vs-

CHARLES H. BARR and TIG INSURANCE COMPANY,

Defendants.

CASE NO. –00-CV-001705

CASE CODE NO. - 30703

ORDER FOR JUDGMENT

The motion of the defendants, Charles H. Barr and TIG Insurance company, for frivolous claims costs, having come on for hearing on April 29, 2002, before the Honorable Dennis P. Moroney in his courtroom in the Milwaukee County Courthouse, and for the court having determined that the action in the above entitled matter was frivolous and having heard testimony with respect to the issues of allocation and the amount of fees and costs to be awarded, and the court further having considered the arguments of counsel for Mr. Morters and Attorney Sutton on his own behalf;

NOW, THEREFORE, IT IS ORDERED:

1. That an amount of Twenty Thousand and 00/100 ($20,000.00) Dollars shall be awarded to the defendants of the total amount of Forty Thousand Two Hundred Forty-Five and 43/100 ($40,245.43) Dollars being requested by defendants.

2. That Judgment be entered on behalf of the defendants against the plaintiff, Ronald W. Morters in the amount of Ten Thousand and 00/100 ($10,000.00) Dollars and that a separate Judgment be entered against Attorney Robert E. Sutton in the amount of Ten Thousand and 00/100 ($10,000.00) Dollars.

3. That payment of the above sums shall be made on or before May 29, 2002 and shall be payable to the Trust Account of Quale, Feldbruegge, Calvelli, Thom & Croke, S.C.; in the event payment is not made, defendants shall be entitled to enter Judgment in said amount against Ronald W. Morters and Attorney Robert E. Sutton.

Dated at Milwaukee, Wisconsin this 25th day of ~~May~~ [June], 2002.

BY THE COURT:

/s/ Dennis P. Moroney
Honorable Dennis P. Moroney
Circuit Court Judge

OFFICE OF THE CLERK

Supreme Court of Wisconsin

[SEAL]

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To:

June 12, 2003

Hon. Dennis P. Moroney
Milwaukee County Circuit Court
901 N. Ninth Street
Milwaukee, WI 53233

John Barrett
Milwaukee County Clerk of Courts
Appeals Processing Division
901 N. Ninth Street, Room G-8
Milwaukee, WI 53233

Ronald W. Morters
2755 Minot Lane
Waukesha, WI 53188

William P. Croke
Quale-Feldbruegge Law Firm
710 N. Plankinton Ave., 9th Floor
Milwaukee, WI 53203

Robert E. Sutton
Robert E. Sutton, S.C.
2631 N. Downer Avenue
Milwaukee, WI 53211

You are hereby notified that the Court has entered the following order:

No. 02-2434 *Morters v. Barr* L.C. #99CV5303, 00CV1705

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-appellant-petitioner, Ronald W. Morters, and considered by this court;

IT IS ORDERED that the petition for review is denied, with $50 costs.

Cornelia G. Clark
Clerk of Supreme Court

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statutes

814.025 Costs upon frivolous claims and counterclaims.

(1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.

(2) The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action, special proceeding, cross complaint, defense or counterclaim or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

(3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous

under sub. (1), the court must find one or more of the following:

(a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

WISCONSIN JURY INSTRUCTION

WIS JI-CIVIL

1500 CAUSE

(A) Question(s) in the special verdict ask(s) about the cause of the (accident) (injury). (This) (These) question(s) (do) (does) not ask about "*the* cause" but rather "*a* cause" because an (accident) (injury) may have more than one cause. An (accident) (injury) may be caused by one person's negligence or by the combined negligence of two or more people.

You must decide whether someone's negligence caused the (accident) (injury). Someone's negligence caused the (accident) (injury) if it was a substantial factor in producing the (accident) (injury).

SUPREME COURT OF WISCONSIN
Appeal No. 02-2434

RONALD W. MORTERS,

Plaintiff-Appellant-Petitioner,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants-Respondents-Respondents.

SHANNON L. MORTERS,

Plaintiff,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

PETITION FOR REVIEW

Court appealed from: Wisconsin Court of Appeals, District I, Hon. Ted E. Wedemeyer, Jr., Patricia S. Curley & David G. Deininger, Appellate Judges

Ronald W. Morters
Petitioner, Pro Se

2755 Minot Lane
Waukesha, Wisconsin 53188
Telephone: (262) 544-4355

* * *

STATEMENT OF THE CRITERIA SUPPORTING REVIEW

The criterion under Wisconsin Statutes, Sec. 809.62(1), which supports the granting of review of this matter by the Supreme Court is as follows:

The petition for review demonstrates a need for the Supreme Court to consider establishing, implementing, or changing a policy within its authority. (Wis. Stats., Sec. 809.62(1)(b))

Explanation:

The determination of whether the facts of a case fulfill the legal standard of frivolousness is a question of law which is reviewed independently of the conclusions of the lower courts. See *State v. State Farm Fire & Cas. Co.*, 100 Wis. 2d 582, 602, 302 N.W. 2d 827 (1981) and *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 236, 517 N.W. 2d 658 (1994) The de novo standard of review contemplates a fresh and independent analysis of the facts and arguments by the appellate courts when reviewing a frivolity determination.

In affirming the frivolity determination, the Court of Appeals' reasoning consisted of one paragraph agreeing with the trial court's position and asserting that Mr. Morters should have known his positions were frivolous.[1] There is no independent discussion of the individual claims themselves or Mr. Morters' arguments. The Court of Appeals failed to set forth any independent legal analysis as to why Ronald's claims were frivolous. The first

[1] (R. NN; P. App. 107)

issue raised by this petition and the Court of Appeals' treatment thereof demonstrates the need for the Supreme Court to establish clear policy guidelines requiring the Court of Appeals to adhere to the de novo standard of review and present a truly independent analysis of whether a litigant's claim is frivolous.

The second issue regarding whether an assessment was appropriate demonstrates the need for the Supreme Court to strengthen the frivolity movant's duty to mitigate its damages by requiring such movant to attempt to cut off allegedly frivolous claims as soon as possible so that litigation is not needlessly protracted. The current duty of mitigation set forth in *Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 575-576, 597 N.W. 2d 744 (1999) does not send a strong enough message to frivolity movants that they must act as soon as possible. The assessment issue also demonstrates the need for the Supreme Court to adopt an advanced notice provision for frivolous claims similar to that contained in Rule 11c of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE AND FACTS[2]

A. Introduction

This petition seeks review of the decision of the Court of Appeals, District I, dated March 25, 2003 wherein the Court affirmed the final judgment entered on July 29, 2002 and the underlying frivolity decision and order of the

* * *

[2] The Court of Appeals' factual statement is found on pages 2 through 5 of its Decision. (R. NN; P. App. 102-105)

The Morters rejected the offer, dismissed Barr, and hired Aiken and Scoptur as their new attorney. (R. 19-6, 44-4 through 7; P. App. 170, NR) A new trial date was set for July 31, 1995. (R. 19-34; P. App. 175) On June 29, 1995, their new law firm stipulated to canceling the trial and having the case resolved by arbitration. (R. 19-34, 44-7; P. App. 175, NR) Mr. Morters disputed that he had authorized arbitration, and the Morters subsequently fired Aiken and Scoptur. (R. 44-7, NN; P. App. NR, 261)

Their new attorney, Willis J. Zick, moved to relieve the Morters from the stipulation in September of 1995, but the motion was later withdrawn. (R. 44-7 & 8, 19-34; P. App. NR, 175) At Ann's insistence, Ronald agreed to arbitrate because of her stress and illness which ultimately resulted in her death. (R. 19-7; P. App. 171) The arbitrator awarded a total of $557,384.17 on the three claims. (R. 44-5, NN; P. App. NR, 261)

The Morters then challenged their former attorneys entitlement to fees on the grounds that their actions breached their respective contracts for representation of the Morters. (R. 46-100 through 102; P. App. NR) Judge James R. Kieffer ruled that the Morters did not have just cause to discharge their former attorneys and awarded fees to both. (R. 46-81 through 86, 125 & 126; A. App. NR)

C. Milwaukee County Proceedings

1. Commencement of Suits

Ronald and Shannon commenced separate actions for professional negligence and breach of contract against Barr and his insurer, TIG, alleging that Barr had a conflict of interest in representing all three plaintiffs, Barr deprived them of a jury trial by agreeing to adjourn the

original trial date, and Barr failed to timely sue, demand policy limits, or file a statutory offer to settle. (R. 19-4 through 9, 1-5 through 8; P. App. 168-173, NR) Ronald's suit also included two claims with respect to the handling of insurance benefits. (R. 19-8; P. App. 172) Ann died prior to the filing of these suits. These cases were consolidated for

* * *

ARGUMENT

I. THE MORTERS' CLAIMS AGAINST BARR AND HIS INSURER IN THESE CASES WERE NOT FRIVOLOUS UNDER WISCONSIN STATUTES, SEC. 814.025.

A. Introduction And Applicable Legal Standards

This frivolity finding is based on Sec. 814.025(3)(b), which requires the Court to find the following in order to find an action to be frivolous:

> "The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law *or equity* and could not be supported by a good faith argument for an extension, modification or reversal of existing law." [Emphasis added]

Frivolity inquiries involve a mixed question of law and fact. *State Farm*, 100 Wis. 2d at 601-602. The findings of the circuit court and reasonable inferences drawn are questions of fact which will not be upset unless against the great weight and preponderance of the evidence. *Stern*, 185 Wis. 2d at 236, citing *Sommer v. Carr*, 99 Wis. 2d 789, 792, 299 N.W. 2d 856 (1981) and *Robertson-Ryan v. Pohlhammer*, 112 Wis. 2d 583, 590, 334 N.W. 2d 246 (1983).

Whether the facts fulfill the legal standard of frivolousness is a question of law which is reviewed independently of the conclusions of the lower courts. *State Farm*, 100 Wis. 2d at 602 and *Stern*, 185 Wis. 2d at 236.

Stringent standards have evolved for evaluating frivolity claims. When a frivolous action claim is made, all doubts are resolved in favor of finding a claim *nonfrivolous*. *Stern*, 185 Wis. 2d at 335 and *In Matter of Estate of Bilsie*, 100 Wis. 2d 342, 350, 302 N.W. 2d 508 (Ct. App. 1981) A claim is not frivolous merely because there is a failure of proof. *Stern*, 185 Wis. 2d at 243. A claim is also not frivolous merely because it was later shown to be incorrect or because it lost on the merits. *Stern*, 185 Wis. 2d at 243-244, citing *Sommer*, 99 Wis. 2d at 797.

The failure to survive summary judgment does not mean that the action is frivolous. *Stern*, 185 Wis. 2d at 244, footnote 9. When analyzing frivolity cases, the issue is not whether a party can or will prevail but whether the party's position is *so indefensible* that it is frivolous and the party should have known it. *Stoll v. Adriansen*, 122 Wis. 2d 503, 515, 362 N.W. 2d 182 (Ct. App. 1984) citing *Sommer*, 99 Wis. 2d at 797.

In light of the foregoing standards and the applicability of the de novo standard of review, Ronald believes the Court of Appeals has an institutional duty to independently evaluate and discuss his claims when the allegations of trial court error have a reasonable basis under existing Wisconsin law regarding causation, law of the case, and arbitration. THERE IS NO CONTROLLING CASE LAW REGARDING THE EFFECT OF ARBITRATION WHICH WOULD PROHIBIT RONALD'S CLAIMS. The Court of Appeals' analysis of the frivolity issue consisted of one long

quotation of the trial court's decision and one paragraph expressing its agreement with the same. (R. NN; P App. 106-107) The decision is also curious since the Court found the appeal on the merits was not frivolous. (R. NN; P. App. 275)

In her dissenting opinion *Jackson v. Benson*, 2002 WI 90, par 14-28, 255 Wis. 2d 24, 647 N.W. 2d 815 (2002), Chief Justice Abrahamson discussed the problem of insufficient findings and reasoning to justify a frivolity determination. The decision in this case exemplifies the problem and demonstrates the need for the Supreme Court to establish clear guidelines requiring an independent analysis and reasoning by the Court of Appeals as to whether a claim is frivolous. The following discussion will show the Morters' claims to be fully defensible and reasonably based.

B. The Jury Trial Deprivation Claim

1. Causation

In affirming the frivolity decision on the jury trial claim based on causal grounds, the Court ignored well established case law regarding causation. Under Wisconsin law, an accident or injury may be caused by the combined negligence of two or more persons. See Wisconsin Jury Instructions – Civil No. 1500. In Wisconsin, the test for whether negligence is causal is whether the negligence was a substantial factor in causing the injuries. *Merco Distributing Corp. v. Commercial Police Alarm Co., Inc.*, 84 Wis. 2d 455, 458, 267 N.W. 2d 652 (1978)

Under the substantial factor concept of causation, there may be several substantial factors contributing to the same result. *Sampson v. Laskin*, 66 Wis. 2d 318, 326,

224 N.W. 2d 594 (1975) According to *Schnabl v. Ford Motor Co.*, 54 Wis. 2d 345, 353-354, 195 N.W. 2d 602, 198 N.W. 2d 161 (1972), the negligent act need not be the sole factor, the primary factor, but only a substantial factor in causing the injury. Thus, Wisconsin law only required Ronald to demonstrate that Barr's behavior was a substantial factor in causing the loss of a jury trial.

The facts regarding the jury trial claim are undisputed. The trial was scheduled to begin on August 15, 1994 before Judge Snyder. (R. 19-5 & 39; P. App. 169, 176) The Morters wanted a jury trial (R. 19-5, 46-63 & 64; P. App. 169, 180 & 181) Barr had repeatedly tried to convince the Morters to settle, mediate, or arbitrate the case (R. 19-5, 46-63 & 64; P. App. 169, 180 & 181) Sometime before July 23, 1994, Barr and the insurer's counsel secretly agreed to adjourn the jury trial and proceed with mediation. (R. 19-5; P. App. 169) A letter was delivered to Judge Snyder's court on July 23, 1994 requesting such adjournment. (R. 19-6, 40 & 41; P. App. 170, 177 & 178)

The Morters had not consented to the adjournment and did not know about the request. (R. 19-5 & 6; P. App. 169-170) Unaware that the Morters had not consented to this adjournment, Judge Snyder granted the request without the necessity of hearing because of the strong likelihood that the case would be bumped. (R. 19-6 & 40; P. App. 170, 177)

The jury trial was rescheduled for July 31, 1995. (R. 19-34; P. App. 175) During the delay, a dispute developed between Ronald and Ann as to whether the case should be decided by a jury or an arbitrator. (R. 19-7; P. App. 171) Initially, the Morters agreed to accept arbitration because

of Ann's insistence and to prevent further stress to her, but later withdrew their consent. (R. 19-7; P. App. 171)

The Morters presented the opinions of Schulz and Tessier that, among other things, Barr was negligent in agreeing to adjourn the August 15, 1994 trial and in representing all of them. (R. 23-3 through 5, 7 & 8, 40-3 through 5, 6 & 7; P. App. 285-294) The Morters submitted Dunphy's opinion which valued the case at substantially more than the arbitration award. (R. 72-4 & 5; P. App. 283-284)

From those facts, the jury could have concluded that Barr's conduct was a substantial factor in delaying the case and causing such internal friction that the Morters felt compelled to arbitrate. Had Judge Snyder known the Morters had not agreed to an adjournment, he would have likely given the case a higher priority and assigned the next available trial date.

The problem with the jury trial claim was that the causal nexus between Barr's behavior and the loss of the jury trial simply was not strong enough to constitute a substantial factor. In other words, there was a failure of proof and a failure to survive summary judgment. As the *Stern* and *State Farm* cases pointed out, however, such failures do not render the claim frivolous.

2. Arbitration

Judge Moroney also believed that the arbitration proceedings foreclosed the jury trial claim and provided

additional support for frivolity determination. (R. 129-4; P. App. 116) Based on his subsequent comments on page 5 of the decision[5] and those at the April 29, 2002 hearing[6] regarding the finality of arbitration, Judge Moroney clearly felt that an unchallenged arbitration award prevented a subsequent suit for malpractice. Judge Franke, on the other hand, did not share such opinion since he denied Barr's motion to preclude Tessier's testimony regarding the value of the case based on the argument that the arbitrator's decision was final (R. 112-46, 75-2; P. App. 204, 206) Although there is no controlling case law as to the effect of an arbitration on a subsequent suit for malpractice, the Court of Appeals did not address this issue.

While Judge Moroney could believe that the arbitration award would bar such suits, the Morters could argue in good faith to the contrary since Barr was not party to the arbitration agreement, and had no derivative interest founded on the agreement. Barr shared no mutuality of interest with the Waukesha County defendants. The Morters alleged a reasonable basis for their damages, i.e. the difference between what they could prove a jury would have awarded and the amount the arbitrator awarded. They did not seek to duplicate previous damages.

The ruling in *Dane County v. Dane County Union Local 65*, 210 Wis. 2d 267, 565 N.W. 2d 540 (Ct. App. 1997) lends support to the Morters' position. In *Dane County*, the Court examined whether one arbitrator's decision can have a preclusive effect on the ability of a subsequent

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[5] (R. 129-5; P. App. 117)

[6] (R. 156-60 & 65; P. App. 119, 124)

second arbitrator. The Court looked at the doctrines of issue and claims preclusion and concluded as follows:

> "Where, at a minimum, the claim, or the issue necessarily decided in the first arbitration is the same as in the second arbitration, the parties are the samc, the parties have had a full opportunity to argue their respective positions to the first arbitrator and the parties have not agreed to resubmit the claim or the issue necessarily decided in the first arbitration to a second arbitration, then, the preclusion doctrines may be applied by an arbitrator or by a reviewing court." *Dane County*, 210 Wis. 2d at 279-280.

Due to differences in the parties and the nature of the claims, the arbitration could not have had a preclusive effect on the Milwaukee County litigation. Even if wrong, the Morters' position had a reasonable basis.

C. The Conflict of Interest Claim

Because Judge Kieffer had determined that there was no conflict of interest, Judge Moroney found the conflict of interest claim to be frivolous based on issue preclusion. (R. 129-4; P. App. 116) Judge Franke, however, granted summary judgment on this claim due to a lack of causal connection between the alleged negligent acts and any loss to the Morters. (R. 105-44 through 47, 60-2; P. App. 190-193, 203) The Court rejected Barr's issue preclusion argument and ordered that "[d]efendants' motion is denied insofar as it contends that plaintiffs' claims are barred by issue preclusion." (R. 105-4 through 9, 60-1; P. App. 183-188, 202)

Utilizing one of the criteria set forth in *Michelle T. v. Crozier*, 173 Wis. 2d 681, 495 N.W. 2d 327 (1993), Judge Franke believed there was a material difference between the type of case and the context involved in the two cases. (R. 105-7 & 8; P. App. 186, 187) The Court concluded that " . . . the right to litigate these issues fully takes precedence over whatever gain and the efficiency that there might be in the settings we might have." (R. 105-9; P. App. 188)

Regardless of whether Judge Moroney disagreed with Judge Franke's ruling, he was bound by it pursuant to the doctrine of "law of the case." See *Beal v. First Fed. Sav. & Loan Assoc. of Madison*, 90 Wis. 2d 171, 190, 279 N.W. 2d 693 (1979) According to *Black's Law Dictionary*, 4th Edition (1957), the doctrine expresses a practice of courts generally refusing to reopen what has been decided. The law of the case doctrine is well engrained in Wisconsin law. See for example, *Peterson v. Warren*, 31 Wis. 2d 547, 570, 143 N.W. 2d 449 (1966) and *State v. Brady*, 130 Wis. 2d 443, 447-448, 388 N.W. 2d 151 (1986). Since Judge Franke had already ruled on the issue preclusion matter, his decision therefore became the law of the case for these proceedings at the Circuit Court level. Thus, such grounds could not be used by Judge Moroney to support his frivolity decision. Even if the Franke decision was not the law of the case on this issue, *Crozier* provided the Morters with a reasonable basis for instituting the conflict of interest claim despite Judge Kieffer's decision.

D. The Insurance Claims

The insurance claims were determined to be frivolous because the Morters' failed to respond to this portion of the

summary judgment motion. (R. 129-4; P. App. 116) Although these claims were abandoned at the summary judgment stage, a claim is not frivolous simply because a party fails to pursue it. *Stoll*, 122 Wis. 2d at 518.

E. The Delay In Filing Claim

1. *Schlomer*

Based on the *Schlomer* case and causation ground, the trial court found the delay in filing claim to be frivolous. (R. 129-4 & 5; P. App. 116 & 117) Judge Moroney's reliance on *Schlomer* to support a frivolity decision is strange in light of Judge Franke's treatment of this matter. *Schlomer* held that delay by an attorney alone cannot cause damage unless it is probable that the delay caused a loss of witness, the passing of a statute of limitations, or similar results. *Schlomer*, 169 Wis. 2d at 253. In *Schlomer*, the plaintiff sued his former attorney for negligence alleging delay in filing a lawsuit and loss of use of funds resulting from the delay. *Schlomer*, 169 Wis. 2d at 248-249. The jury found causal negligence and damages, but the Supreme Court denied recovery on public policy grounds because the injury was too remote from the negligence and too out of proportion to the culpability of the negligent tortfeasor. *Schlomer*, 169 Wis. 2d at 254.

Because *Schlomer* involved public policy, Judge Franke denied the portion of Barr's summary judgment motion based thereon as premature and indicated that the contention might be reconsidered after a full record was developed. (R. 105-52 & 53, 60-1; P. App. 198, 199 & 202) In his directed verdict ruling, Judge Franke accepted the arguments about *Schlomer* but did not base his decision on the same. (R. 111-89; P. App. 230) The fact that Judge

Franke was initially unsure of the effect of *Schlomer* demonstrates that reasonable minds can differ in their interpretations of the case and its public policy considerations.

Using public policy considerations to evaluate frivolity is an extremely perilous proposition for litigants. According to *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis. 2d 723, 736, 275 N.W. 2d 660 (1979), whether public policy considerations preclude liability is a question of law solely for judicial discretion. In *Stewart v. Wulf*, 85 Wis. 2d 461, 479, 271 N.W. 2d 79 (1978), the Supreme Court recognized that cases where a causally negligent tortfeasor is relieved of liability are infrequent and unusual. Basing frivolity on public policy considerations places the impossible burden on litigants of having to predict in advance how a court might exercise its public policy discretion even though the elements of a tort are present.

2. Causation

The trial court erred in concluding that the Morters presented no evidence establishing that the delay in filing caused them damage. Attorneys Schulz and Tessier both testified that Barr was negligent in failing to file the actions earlier. (R. 108-221 & 222, 110-117, 118 & 126; P.

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COURT OF APPEALS OF WISCONSIN
DISTRICT I
Appeal No. 02-2434

RONALD W. MORTERS,

Plaintiff-Appellant,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants-Respondents.

SHANNON L. MORTERS,

Plaintiff,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

APPELLANT'S BRIEF

Court appealed from: Circuit Court for Milwaukee County

Presiding Judge: Hon. Dennis P. Moroney, Circuit Judge

Ronald W. Morters
Appellant, Pro Se

2755 Minot Lane
Waukesha, Wisconsin 53188
Telephone: (262) 544-4355

* * *

ARGUMENT

I. THE MORTERS' CLAIMS AGAINST BARR AND HIS INSURER IN THESE CASES WERE NOT FRIVOLOUS UNDER WISCONSIN STATUTES, SEC. 814.025.

A. Introduction And Applicable Legal Standards

The frivolity finding herein is based on Wisconsin Statutes, Sec. 814.025(3)(b), which requires the Court to find the following in order to find an action to be frivolous:

> "The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law."

Frivolity inquiries involve a mixed question of law and fact. *State v. State Farm Fire & Cas. Co.*, 100 Wis. 2d 582, 601-602, 302 N.W. 2d 827 (1981) The findings of the circuit court and reasonable inferences drawn are questions of fact which will not be upset unless against the great weight and preponderance of the evidence. *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 236, 517 N.W. 2d 658 (1994), citing *Sommer v. Carr*, 99 Wis. 2d 789, 792, 299 N.W. 2d 856 (1981) and *Robertson-Ryan v. Pohlhammer*, 112 Wis. 2d 583, 590, 334 N.W. 2d 246 (1983) Whether the facts fulfill the legal standard of frivolousness is a question of law which is reviewed independently of the conclusions of the lower courts. *State Farm*, 100 Wis. 2d at 602 and *Stern*, 185 Wis. 2d at 236. See also *Zinda v. Krause*, 191 Wis. 2d 154, 176, 528 N.W. 2d 55 (Ct. App. 1995) When a frivolous action claim is made, all doubts are resolved in favor of finding a claim nonfrivolous. *Stern*

v. Thompson & Coates, Ltd., 185 Wis. 2d at 235 and *In Matter of Estate of Bilsie*, 100 Wis. 2d 342, 350, 302 N.W. 2d 508 (Ct. App. 1981)

A claim is not frivolous merely because there is a failure of proof. *Stern*, 185 Wis. 2d at 243, citing *State Farm* 100 Wis. 2d at 604 and *Robertson-Ryan*, 112 Wis. 2d at 590. A claim is also not frivolous merely because it was later shown to be incorrect or because it lost on the merits. *Stern*, 185 Wis. 2d at 243-244, citing *Sommer*, 99 Wis. 2d at 797. In a footnote in the *Stern* opinion, the Supreme Court emphasized that the failure to survive summary judgment does not mean that the action is frivolous. *Stern*, 185 Wis. 2d at 244, footnote 9.

When analyzing frivolity cases, the issue is not whether a party can or will prevail but whether the party's position is so indefensible that it is frivolous and the party should have known it. *Stoll v. Adriansen*, 122 Wis. 2d 503, 515, 362 N.W. 2d 182 (Ct. App. 1984) citing *Sommer*, 99 Wis. 2d at 797. Frivolousness exists only when there is *no* reasonable basis for a claim. *Bilsie*, 100 Wis. 2d at 350. Although presently unsuccessful, the following discussion will show the Morters' claims to be fully defensible and reasonably based.

B. The Deprivation Of Jury Trial Claim

1. Causation Grounds

Judge Franke granted summary judgment on the jury trial claim because he felt there was no causal connection between Barr's alleged negligent acts and any loss by the Morters. (R. 105-44 through 47, 60-2; A. App. 197-200, 210) Judge Moroney's frivolity decision was based on causal grounds due to Barr's termination before a new jury trial

could be set and the submission of the case to arbitration which prevented a jury trial. (R. 129-4; A. App. 104) The Court's causal reasoning, however, ignores well established case law regarding causation.

Under Wisconsin law, an accident or injury may be caused by the combined negligence of two or more persons. See Wisconsin Jury Instructions – Civil No. 1500. In Wisconsin, the test for whether negligence is causal is whether that negligence was a substantial factor in causing the injuries. *Merco Distributing Corp. v. Commercial Police Alarm Co., Inc.*, 84 Wis. 2d 455, 458, 267 N.W. 2d 652 (1978) Under the substantial factor concept of causation, there may be several substantial factors contributing to the same result. *Sampson v. Laskin*, 66 Wis. 2d 318, 326, 224 N.W. 2d 594 (1975) According to *Schnabl v. Ford Motor Co.*, 54 Wis. 2d 345, 353-354, 195 N.W. 2d 602, 198 N.W. 2d 161 (1972), the negligent act need not be the sole factor, the primary factor, but only a substantial factor in causing the injury.

When the jury trial deprivation claim was brought, Mr. Morters knew that Wisconsin law only required him to demonstrate that Barr's behavior was a substantial factor in causing the loss of the jury trial. The question then becomes whether the facts developed during the litigation provided a reasonable basis for them to argue that Barr's conduct was a substantial factor in producing the loss.

In evaluating summary judgment motions, any reasonable doubt as to the existence of a disputed material fact is resolved against the moving party, and all inferences from the evidence are to be viewed in the light most favorable to the nonmovant. See *Clay v. Horton Mfg. Co., Inc.*, 172 Wis. 2d 349, 493 N.W. 2d 379 (Ct. App. 1992) and

Grams v. Boss, 97 Wis. 2d 332, 338-339, 294 N.W. 2d 473 (1980). Morters was aware of these standards.

There is virtually no dispute as to the facts as they existed at the time summary judgment was granted. A jury trial was scheduled to begin on August 15, 1994 in the Morters case before Judge Snyder. (R. 19-5 & 39; A. App. 176, 183) At that time, the Morters wanted a jury trial. (R. 19-5, 46-63 & 64; A. App. 176, 187 & 188) Barr had repeatedly tried to convince the Morters to settle, mediate, or arbitrate the case. (R. 19-5, 46-63 & 64; A. App. 176, 187 & 188) Sometime before July 23, 1994, Barr and the insurer's counsel secretly agreed to adjourn the jury trial and proceed with mediation. (R. 19-5; A. App. 176) A letter was delivered to Judge Snyder's court on July 23, 1994 requesting such adjournment. (R. 19-6, 40 & 41; A. App. 177, 184 & 185)

The Morters had not consented to the adjournment and did not even known about the request. (R. 19-5 & 6; A. App. 176 & 177) Unaware that the Morters had not consented to this adjournment, Judge Snyder granted the request without the necessity of a hearing because of the strong likelihood that the case would be bumped due to a case which started the previous week and ran four days into the week of August, 15, 1994. (R. 19-6 & 40; A. App. 177 & 184) Mr. Morters only learned about the adjournment after he contacted the court clerk and was advised that the trial had been adjourned. (R. 19-6; A. App. 177)

The jury trial was rescheduled for July 31, 1995. (R. 19-34; A. App. 182) During the delay, a dispute developed between Ronald and Ann as to whether the case should be decided by a jury or an arbitrator. (R. 19-7; A. App. 178) Initially, the Morters agreed to accept arbitration because

of Ann's insistence and to prevent further stress to her, but later withdrew their consent. (R. 19-7; A. App. 178)

The Morters presented the opinions of Schulz and Tessier that, among other things, Barr was negligent in agreeing to adjourn the August 15, 1994 and in representing all of the Morters. (R. 23-3 through 5, 7 & 8, 40-3 through 5, 6 & 7; A. App. 286-295) The Morters submitted the opinion of Attorney Dunphy which valued the case at substantially more than the arbitration award. (R. 72-4 & 5; A. App. 311 & 312)

The dispute in this case arose with respect to the inferences and conclusions to be drawn from those facts. The Court accepted Barr's conclusions that the Morters were not harmed by Barr's negligence because they could have subsequently tried their case to a jury. While such conclusion can be drawn from those facts, it is not the only possible conclusion which can be reached.

The jury could have examined those same facts and concluded that Barr's conduct substantially delayed the case and caused such internal friction that the Morters felt compelled to arbitrate. There is a distinct possibility that this case could have been tried long before July 31, 1995 had Barr not voluntarily agreed to an adjournment. Had Judge Snyder known the Morters had not agreed to an adjournment, a hearing would have been held with respect to the adjournment request. With the Morters' wishes known to him, Judge Snyder would then have made an informed decision on how to relieve the conflict in the trial calendar.

It is reasonable to conclude that the next earliest available date would have been assigned to this case However, since he thought the Morters consented to such

adjournment, the Judge would not have realized that proceeding to trial as soon as possible was important to the Morters. At trial, Attorney Johnson explained what is common practice in the circuit courts when a case is bumped. (R. 108-176; A. App. 236) He indicated that if you were moved from your trial date through no fault of your own the judges would normally assign your case a higher priority than other cases. (FR. 108-176; A. App. 236)

The Morters' problem with their jury trial claim was not that no causal nexus existed between Barr's behavior and the loss of the jury trial, but rather that the nexus shown by the facts simply was not strong enough to constitute a substantial factor. In other words, there was a failure of proof and a failure to survive summary judgment. As the *Stern* and *State Farm* cases pointed out, however, such failures do not render the claim frivolous. The Morters' jury trial claim had a reasonable factual and legal basis and should not have been found frivolous due to a lack of causation.

2. Arbitration Grounds

Judge Moroney also believed that the arbitration proceedings and award essentially foreclosed the jury trial claim and provided an additional basis to support a frivolity determination. (R. 129-4; A. App. 104) When Judge Moroney's ruling is read in light of his subsequent comments on page 5 of the decision[4] and those at the April 29, 2002 allocation hearing[5] regarding the finality of

[4] (R. 129-5; A. App. 105)

[5] (R. 156-60 & 65; A. App. 137 & 142)

arbitration, Judge Moroney clearly felt that an unchallenged arbitration award prevented a subsequent suit for malpractice. Judge Franke, on the other hand, did not share such opinion since he denied the motion to preclude Tessier's testimony regarding the value of the case based on the argument that the arbitrator's decision was final. (R. 112-46, 75-2; A. App. 221, 228) When the two Circuit Judges assigned to the case had differing opinions about the effect of the arbitration on the Morters' lawsuits, the Court should reject any frivolity finding based on the arbitration.

Judge Moroney's view is based on a confused reading of the law with respect to the effect of arbitration. Wisconsin Statutes, Sec. 788.10, sets forth very limited grounds for vacating an arbitration award. According to *In Re Arbitration: Scherrer Construction Company v. Burlington Memorial Hospital*, 64 Wis. 2d 720, 735, 221 N.W. 2d 855 (1974), arbitration awards are presumptively valid, and invalidity may only be shown by clear and convincing evidence. In *Madison v. Madison Police Ass'n*, 144 Wis. 2d 576, 586-587, 425 N.W. 2d 8 (1988), the Supreme Court reiterated a "hands off" approach with respect to arbitration awards indicating that the same would not be overturned absent "perverse misconstruction," "positive misconduct," "manifest disregard of the law," or "if the award is illegal or violates strong public policy."

Had the Morters sought to overturn the arbitration award, they would have faced a difficult standard of review. However, the Morters' lawsuits were against Barr for negligence and breach of contract. The aforementioned case law with respect to the finality of arbitration was not applicable to this case. When these suits were filed, there

was no case law which indicated that an unchallenged arbitration would bar these actions.

While Judge Moroney could make a good faith argument that the arbitration award would bar such suits, the Morters could argue in good faith to the contrary since Barr was not party to the arbitration agreement and had no derivative interest founded on the agreement. Barr shared no mutuality of interest with the defendants in the Waukesha County litigation. The Morters alleged a reasonable basis for their damages, i.e. the difference between what they could prove a jury would have awarded and the amount the arbitrator awarded. They did not seek to duplicate previous damages.

The Court of Appeals' ruling in *Dane County v. Dane County Union Local 65*, 210 Wis. 2d 267, 565 N.W. 2d 540 (Ct. App. 1997) lends support to the Morters' position. In *Dane County*, the Court examined whether one arbitrator's decision can have a preclusive effect on the ability of a subsequent second arbitrator. The Court looked at the doctrines of issue and claims preclusion and arrived at the following conclusion:

> "Where, at a minimum, the claim, or the issue necessarily decided in the first arbitration is the same as in the second arbitration, the parties are the same, the parties have had a full opportunity to argue their respective positions to the first arbitrator and the parties have not agreed to resubmit the claim or the issue necessarily decided in the first arbitration to a second arbitration, then, the preclusion doctrines may be applied by an arbitrator or by a reviewing court." *Dane County*, 210 Wis. 2d at 279-280.

Due to the differences in parties and the nature of the claims, the arbitration could not have had a preclusive effect on the Milwaukee County litigation.

Even if Judge Moroney's view of the law is ultimately determined to be correct, the Morters' position is far from frivolous because no controlling case law existed to alert them that the arbitration foreclosed a suit against Barr. The effect of an arbitration award in this situation is an area of the law which needs development.

C. The Conflict Of Interest Claim

Because Judge Kieffer had determined at the fee hearing that there was no conflict of interest regarding Barr's representation, Judge Moroney found the Morters' conflict of interest claim to be frivolous based on issue preclusion grounds. (R. 129-4; A. App. 104) Judge Franke, however, granted summary judgment on this claim due to a lack of causal connection between the alleged negligent acts and any loss to the Morters. (R. 105-44 through 47, 60-2; A. App. 197-200, 210) The Court rejected Barr's issue preclusion argument and recited in its order granting partial summary judgment that "[d]efendants' motion is denied insofar as it contends that plaintiffs' claims are barred by issue preclusion." (R. 105-4 through 9, 60-1; A. App. 190-195, 209) Utilizing the rules set forth in *Michelle T. v. Crozier*, 173 Wis. 2d 681, 495 N.W. 2d 327 (1993), the Court discussed extensively on pages 4 through 9 of the January 8, 2001 hearing transcript its reasons for denying this part of the motion. (R. 105-4 through 9; A. App. 190-195)

Crozier was presented to the Court in the Morters' brief in opposition to the summary judgment motion[6], and references five factors to be considered in determining the applicability of issue preclusion in a particular case. The Court was persuaded by the third factor which is as follows:

> "do significant differences in the quality or extensiveness of proceedings between two courts warrant relitigation of the issue;" *Crozier*, 173 Wis. 2d at 689 (R. 105-7; A. App. 193)

The Court believed there was a material difference between the type of case and the context involved in the two cases. (R. 105-7 & 8; A. App. 193 & 194) The Court concluded that ". . . the right to litigate these issues fully takes precedence over whatever gain and the efficiency that there might be in the settings we might have." (R. 105-9; A. App. 195)

Regardless, of whether Judge Moroney disagreed with Judge Franke's ruling, he was bound by it pursuant to the doctrine of "law of the case." *See Beal v. First Fed. Sav. & Loan Assoc. of Madison*, 90 Wis. 2d 171, 190, 279 N.W. 2d 693 (1979) According to *Black's Law Dictionary*, 4th Edition (1957), the doctrine expresses a practice of courts generally refusing to reopen what has been decided. The law of the case doctrine is well engrained in Wisconsin law. See among others, *Peterson v. Warren*, 31 Wis. 2d 547, 570, 143 N.W. 2d 449 (1966), *State v. Brady*, 130 Wis. 2d 443, 447-448, 388 N.W. 2d 151 (1986) and *Haase v. R & P Chimney Repair*, 140 Wis. 2d 187, 191-192, 409 N.W. 2d

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[6] (R. 50-4 & 5; A. App. NR)

423 (Ct. App. 1987)[7] Since Judge Franke had already ruled on the issue preclusion matter, his decision therefore became the law of the case for these proceedings at the Circuit Court level.

Judge Moroney, however, "reversed" Judge Franke's decision to support his own frivolity decision. Long ago, in *Parish v. Marvin*, 15 Wis. 247, 271 (*247) (1862), the Supreme Court ruled that the circuit court of one county had no jurisdiction in an action brought to review and reverse the judgment of the circuit court of another county. Sec. 808.03 vests appellate jurisdiction in the Court of Appeals. The finding of frivolity on the conflict of interest claim is clear error and cannot be allowed to stand. Even if the Court ultimately determines that the Franke decision was not the law of the case on this issue, the *Crozier* case provided the Morters with a reasonable basis for instituting the conflict of interest claim despite Judge Kieffer's decision.

D. The Insurance Claims

The Morters' insurance claims were determined to be frivolous because they failed to respond to and contest this portion of the summary judgment motion. (R. 129-4; A. App. 104) Without question, these claims were abandoned at the summary judgment stage. According to the *Stoll* case, a claim is not frivolous simply because a party fails to pursue it. *Stoll*, 122 Wis. 2d at 518. In *Stoll*, a defamation counterclaim was brought, but no mention of it was

[7] Sec. 809.23(3) allows the citation of unpublished appellate opinions to support a claim of law of the case.

made at trial and no proof thereon was submitted. *Stoll*, 122 Wis. 2d at 518. The Court deemed the claim abandoned but refused to find it to be frivolous because the movant failed to present any proof of frivolity other than the failure to put in proof of defamation at trial. *Stoll*, 122 Wis. 2d at 518. The Court's frivolity determination regarding these claims is clearly wrong in light of the reasoning expressed in *Stoll*.

E. The Delay In Filing Claim

1. *Schlomer*

Based on *Schlomer v. Perina*, 169 Wis. 2d 247, 485 N.W. 2d 399 (1992) and causation grounds, the Court found the Morters' delay in filing claim to be frivolous. (R. 129-4 & 5; A. App. 104 & 105) Judge Moroney's reliance on *Schlomer* to support a frivolity decision is strange in light of Judge Franke's treatment of this matter on summary judgment. *Schlomer* held that delay by an attorney alone cannot cause damage unless it is probable that the delay caused a loss of witness, the passing of a statute of limitations, or similar results. *Schlomer*, 169 Wis. 2d at 253. In *Schlomer*, the plaintiff sued his former attorney for negligence alleging delay in filing a lawsuit and loss of use of funds by virtue of the failure to file earlier. *Schlomer*, 169 Wis. 2d at 248-249. The jury found causal negligence and damages, but the Supreme Court denied recovery on public policy grounds because the injury was too remote from the negligence and too out of proportion to the culpability of the negligent tortfeasor. *Schlomer*, 169 Wis. 2d at 254.

When addressing Barr's dismissal argument based on *Schlomer* in its summary judgment decision, Judge Franke ruled as follows:

> "Now, the defense has contended, as I understand it, that even if this expert testimony is admissible, either *Schloemer* [sic] or *Seltrecht* would require that I dismiss the case at this point, and I would concede that there are some close calls as to both of those cases. But *Schloemer* [sic] is ultimately about public policy. It is not about the cause, and the Supreme Court specifically disagreed with the Court of Appeals' conclusions on public policy and essentially it found only that in that case, the injury was too remote from the negligence. That's a very fact specific finding and does not stand for the proposition that in any case of malpractice that there can be no causal connection between negligence and damages. It was possible that *Schloemer* [sic] stands for the proposition that as to the loss of the use of funds, in any case, that damage is lost. But to the extent that *Schloemer* [sic] does address the loss of value in the case and resolves it on public policy grounds,
>
> I'm going to find that it is not binding on this case and that we should proceed to hear the case and decide whether in this case, things are either too remote or too wholly out of proportion of the culpability of the negligence." (R. 105-52 & 53; A. App. 205 & 206)

The Court denied the motion as premature and indicated that the contention might be reconsidered after a full record was developed. (R. 60-1; A. App. 209) In its oral ruling on the directed verdict, the Court stated that it was accepting the arguments about *Schlomer*, but the Court

neither discussed the case further nor based its decision on the same.[8] (R. 111-89; A. App. 257)

Since the original Circuit Judge was initially unsure of the effect of *Schlomer* and the public policy considerations, it is simply incredible that his successor could make a frivolity determination based on *Schlomer*. When two learned Circuit Judges differ on these matters, such fact is prima facie evidence that the delay claim was not frivolous. Reasonable legal minds can differ in their interpretations of *Schlomer* and the public policy considerations.

Using public policy considerations to evaluate frivolity is an extremely perilous proposition for litigants. According to *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis. 2d 723, 736, 275 N.W. 2d 660 (1979), whether public policy considerations preclude liability is a question of law solely for judicial discretion. The application of public policy considerations is solely a function of the court. *Haas v. Chicago & North Western By. Co.*, 48 Wis. 2d 321, 326, 179 N.W. 2d 886 (1970). In *Stewart v. Wulf*, 85 Wis. 2d 461, 479, 271 N.W. 2d 79 (1978), the Supreme Court recognized that cases where a causally negligent tortfeasor is relieved of liability are infrequent and unusual. Basing frivolity on public policy considerations places the impossible burden on litigants of having to predict in advance how a court might exercise its public policy discretion even though all of the elements of a tort are present.

In this case, the Morters, knew they had a prima facie case as to negligence, cause, and damages on the delay

[8] The Court of Appeals did not discuss or utilize *Schlomer* in its April 30, 2002 decision. (R. NN; A. App. 296-310)

claim. Based on the aforementioned case law, they were also aware that public policy considerations could foreclose liability. The Morters, however, could not predict how the court might exercise its public policy discretion. Litigation is difficult enough without requiring the parties to predict the outcomes of discretionary public policy decisions in order to guard against frivolity.

* * *

changes, Morters realizes his argument must first be made to this Court.

The purpose of Sec. 814.025 is to deter litigants and attorneys from commencing or continuing frivolous actions and to punish those who do so. *Stoll*, 122 Wis. 2d at 511. Sec. 814.025 must be enforced to maintain the integrity of the judicial system and the legal profession. *Sommer*, 99 Wis. 2d at 799. Mr. Morters believes that it is consistent with those purposes to require the frivolity movant to mitigate its damages and to provide timely notice of its belief that a claim is frivolous. Barr and TIG failed to mitigate their costs and to provide timely notice with respect to frivolity.

In *Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 575-576, 597 N.W. 2d 744 (1999), the Supreme Court noted the frivolity movant's duty to act reasonably. A relevant consideration in awarding fees is whether "the party seeking fees caused the litigation to be longer than necessary." *Jandrt*, 227 Wis. 2d at 578. The Court stated that a duty of mitigation exists and the frivolity movant should not

* * *

noted that the Sec. 814.025 claim cold have been made earlier. (R. 156-67; A. App. 144)

Before filing a motion for sanctions, Rule 11(c)(1)(A) requires the movant to serve the motion on the opposing party. The party then has twenty-one days to withdraw or correct the challenged paper or claim before the motion is filed. Such provision is intended to provide a "safe harbor" in that a party will not be subject to sanctions unless it refuses to withdraw the challenged pleading. See Notes of Advisory Committee on Rules, 1993 Amendment to Rule 11. The events in this case demonstrate why Wisconsin needs a notice provision equivalent to the federal rule.

First and foremost, the notice requirement would send a clear signal to opposing counsel and their clients that they face monetary peril and should reevaluate their litigation position and evidentiary support. If the client and counsel differ on whether to proceed, each can then take steps to protect their interests. Should the attorney feel he can no longer proceed, he can move to withdraw and the client can

* * *

STATE OF WISCONSIN	CIRCUIT COURT	MILWAUKEE COUNTY

RONALD W. MORTERS,
2755 Minot
Waukesha, Wisconsin 53188

Plaintiff,

vs.

CHARLES H. BARR
250 E. Wisconsin Avenue,
Suite 1020
Milwaukee, Wisconsin 53202

and

TIG INSURANCE COMPANY,
P.O. Box 152870
Irving, Texas 75015

Defendants.

FIRST AMENDED COMPLAINT

Case No. 99-CV-005303

Code: 30703

NOW COMES the plaintiff, Ronald W. Morters, by his attorney, Robert E. Sutton, and for a cause of action against the defendant shows to the Court as follows:

1. The plaintiff, Ronald W. Morters, is an adult residing at 2755 Minot, Waukesha, Wisconsin 53188.

2. The defendant, Charles H. Barr, is an adult and at all times material herein was an attorney-at-law with offices located at 250 East Wisconsin Avenue, Suite 1020, Milwaukee, Wisconsin 53202.

3. The defendant, TIG Insurance Company, upon information and belief, is a corporation having offices located at P.O. Box 152870, Irving, Texas 75015 and a registered agent at 44 East Mifflin Street in the City of

Madison, County of Dane, State of Wisconsin, and it conducts a legal malpractice insurance business, and, as such for a cash consideration and for a premium paid to it, insures and covers against liability or loss, the person or persons so insured, and, in particular, said defendant corporation, issued a policy of insurance to the defendant, Charles H. Barr, and insured Charles H. Barr against any risk and liability or loss arising out of negligence; that upon information and belief, said policy of insurance was in full force and effect at the time of the hereinafter described negligence; that by virtue of the laws of the State of Wisconsin and the terms of the policy of insurance in effect, said defendant corporation is liable to the plaintiff, Ronald W. Morters, in this action for the negligent acts on the part of the defendant, Charles H. Barr, and for the resulting damages hereinafter alleged.

4. On December 21-22, 1990 the plaintiff, his wife, Ann Marie Morters, and his granddaughter, Shannon L. Morters, sustained serious and severe physical injuries as a result of consecutive automobile accidents which occurred at US Highway 18 in Jefferson, Wisconsin. A copy of the accident report is attached hereto and made a part hereof marked Exhibit 1 consisting of 18 pages.

5. In January of 1991 the plaintiff retained the defendant, Charles H. Barr, to represent himself and his wife, Ann Marie Morters, for purposes of commencing an action for damages against Joseph R. Kuenzli and his insurance carrier for the injuries sustained by the plaintiff, his wife and his granddaughter in the accidents. The plaintiff and the defendant entered into a written contract with respect to said representation and a copy of that contract is attached hereto and made a part hereof as Exhibit 2.

6. The defendant, Charles H. Barr, did not file a complaint until June 10, 1993 in the Circuit Court of Waukesha County naming as plaintiffs, Ronald W. Morters, Ann Marie Morters and Shannon L. Morters, a minor, by Vincent Morters and Robin Maslakow, her general guardians. The case was assigned to Branch 4 of the Circuit Court of Waukesha County, the Honorable Patrick Snyder, judge presiding. The civil docket sheet consisting of 6 pages is attached hereto and made a part hereof marked Exhibit 3. The delay in filing the complaint was inordinate, inexcusable and without justification and caused the plaintiff to lose valuable time – years – in obtaining a resolution of his claim. In failing to promptly file a complaint on behalf of the plaintiff, the defendant failed to exercise that degree of care, skill and judgment which is usually exercised under like or similar circumstances by lawyers licensed to practice in Wisconsin.

7. From January, 1991, the time the plaintiff, Ronald W. Morters, retained the defendant, Charles H. Barr, to pursue the claims through July of 1994, the plaintiff repeatedly advised the defendant that the plaintiff desired that all the issues in his case be resolved at a jury trial. The defendant repeatedly attempted to persuade the plaintiff to accept a settlement offered by the attorney for the defendants.

8. On January 7, 1994 a pretrial Scheduling Order was entered by the Court scheduling a jury trial of 12 persons for August 15, 1994 at 1:30 o'clock P.M. A copy of the Scheduling Order is attached hereto and made a part hereof marked Exhibit 4. The defendant advised the plaintiff that the jury trial scheduled for August 15, 1994 was "set in stone."

9. Sometime between July 1, 1994 and July 23, 1994 the defendant without authorization or consent of the plaintiff secretly agreed with Terry E. Johnson, the attorney for the defendants, to request that the jury trial be adjourned and that the matter be mediated. In accordance with the agreement between the defendant and Attorney Johnson the defendant caused a letter to be hand delivered to Judge Snyder on July 23, 1994. A copy of the letter was not provided to the plaintiff. A copy of the letter is attached hereto and made a part hereof as Exhibit 5. Judge Snyder, unaware that the plaintiff had not agreed to the request for the adjournment, granted the request and adjourned the jury trial.

10. During the week prior to August 15, 1994 the plaintiff contacted the Clerk in Judge Snyder's Court to inquire regarding the jury trial and was advised that the jury trial had been adjourned. The plaintiff immediately contacted the defendant and asked why the jury trial had been adjourned. The defendant advised that the case had been "bumped" and that there would be a mediation on August 15, 1994 instead. The defendant did not advise the plaintiff that he had entered any agreement with the defense attorney to adjourn the trial or that he had sent a letter – Exhibit 5 – to the Court.

11. The defendant, Charles H. Barr, in secretly agreeing with the defense attorney, Terry E. Johnson, to request the judge to adjourn the jury trial scheduled for August 15, 1994 and causing the correspondence of July 23, 1994 to be forwarded to the Court without the knowledge or authorization of the plaintiff, did not exercise that degree of care, skill and judgment which is usually exercised under like or similar circumstances by lawyers licensed to practice in Wisconsin; specifically in failing to

keep his client, the plaintiff, reasonably informed about the status of the matter.

12. On August 18, 1994 the plaintiff terminated the services of the defendant.

13. From January, 1991 until he was discharged by the plaintiff on August 18, 1994 the defendant failed to make either a demand for payment of the insurance policy limits or an offer of settlement in an amount sufficient to secure a payment of 12% in interest per year in the event of recovery of damages in an amount exceeding the offer of settlement or policy limits. This failure was also a failure to exercise that degree of care, skill and judgment which is usually exercised under like or similar circumstances by lawyers licensed to practice in Wisconsin.

14. The defendant by filing a complaint in the Circuit Court of Waukesha County naming the three plaintiffs, Ronald W. Morters, Ann Marie Morters and Shannon L. Morters, a minor, by Vincent Morters and Robin Maslakow, her general guardians, knew or should have known that there was a conflict of interest that did exist or could arise from pursuing the claims of the three individuals in one complaint. The defendant did not advise the plaintiff of the possibility of a conflict of interest and the plaintiff did not consent to the representation in writing after consultation.

15. Commencing in 1994 and continuing throughout the prosecution of the claims by successor counsel to the defendant the conflict of interest between the plaintiff and his wife, Ann Marie Morters, and his granddaughter, Shannon L. Morters, a minor by Vincent Morters and Robin Maslakow, her general guardians, became apparent and aggravated in that the plaintiff desired his claims to

be resolved by a jury trial while his wife, Ann Marie Morters, vigorously demanded that the case be decided by arbitration. From 1994 though 1999 [sic] the plaintiff and his wife became involved in heated angry arguments concerning whether the case should go to arbitration or a jury trial. Finally, in January, 1996 the plaintiff agreed to accept binding arbitration only because of the insistence of his wife and to prevent further stress to her.

16. The defendant, Charles H. Barr, in failing to recognize the conflict of interest between the plaintiffs, Ronald W. Morters, Ann Marie Morters and Shannon L. Morters, a minor, by Vincent Morters and Robin Maslakow, her general guardians, and in failing to obtain each clients' consent in writing after consultation did not exercise that degree of care, skill and judgment which is usually exercised under like or similar circumstances by lawyers licensed to practice in Wisconsin.

17. Because of his injuries the plaintiff was entitled to payment of insurance benefits from the employer under a workmen's compensation policy. In 1993 the plaintiff asked the advice of the defendant with respect to taking either a lump sum payment or monthly payments. The defendant advised the plaintiff to take the lump sum payment "because it will all be over in a year." In providing that advice the defendant did not exercise that degree of care, skill and judgment which is usually exercised under like or similar circumstances by lawyers licensed to practice in Wisconsin. Since the case was not resolved until 1996 the plaintiff sustained injuries in the loss of insurance payments that he would have received had he not taken the lump sum payment.

18. As a result of the injuries the plaintiff sustained and the long term of hospitalization he was terminated from his employment in April, 1991. A copy of the letter of termination is attached hereto and made a part hereof marked Exhibit 6. As a result of the loss of his employment the plaintiff's life insurance was cancelled. The plaintiff repeatedly requested that the defendant prepare the appropriate papers necessary for the plaintiff to continue to have life insurance. The defendant advised that he would do so but never did. As a result the plaintiff lost life insurance of a value of Two Hundred Thousand Dollars ($200,000.00). The failure to prepare the necessary documents to obtain continuation of health insurance for the plaintiff by the defendant was a failure to exercise that degree of care, skill and judgment which is usually exercised under like or similar circumstances by lawyers licensed to practice in Wisconsin.

19. As a proximate result of the conduct of the defendant the plaintiff incurred damages including loss of a jury trial, inordinate delay in the recovery of damages, recovery of inadequate damages and loss of life insurance.

FIRST CAUSE OF ACTION
LEGAL MALPRACTICE

20. The actions of the defendant, Charles H. Barr, as set forth above in ¶¶ 1 through 19 constitute legal malpractice.

SECOND CAUSE OF ACTION
BREACH OF CONTRACT

21. The actions of the defendant, Charles H. Barr, as set forth above in ¶¶ 1 through 19 constitute breach of contract.

WHEREFORE, the plaintiff demands judgment against the defendant, Charles H. Barr as follows:

(1) Compensatory damages in an amount to be determined but not less than One Million Dollars ($1,000,000.00)

(2) Punitive damages in an amount to be determined but not less than Five Million Dollars ($5,000,000.00)

(3) Costs and disbursements

(4) Such other relief as may be appropriate.

PLAINTIFF HEREBY DEMANDS TRIAL BY JURY

Dated at Milwaukee, Wisconsin, this 13th day of December, 1999.

/s/ Robert E. Sutton
Robert E. Sutton
State Bar No. 1008459
Attorney for Plaintiff

2631 N. Downer Avenue
Milwaukee, Wisconsin 53211
(414) 961-0802

Exhibit 5

CROEN & BARR
Attorneys At Law

250 East Wisconsin Avenue
Suite 1020
Milwaukee, Wisconsin 55202
Telephone 414 226 2080
FAX 414 226 2070

Request granted—Requirement of motion to adjourn waived due to strong possibility case would be "bumped" for 8-8 trial. They must call in the week of 8/15 for new trial date. 7/25 [Illegible]

July 23, 1994

HAND DELIVERED [handwritten note]

Honorable Patrick L. Snyder
Circuit Judge, Branch 4
Waukesha County Courthouse
515 West Moreland Boulevard
Waukesha, WI 53188

RE: Morters v. Kuenzli, et al., No. 93-CV-1321

Dear Judge Snyder:

This action is scheduled for jury trial on August 15, 1994, at 1:30 p.m. Attorney Terry Johnson and I have been discussing settlement, and we have reached the point where we both feel that mediation would be helpful in resolving the matter. We have agreed to mediate before the Honorable John R. Decker. Judge Decker is willing to mediate the matter, but the earliest mutually available time to do so is the date and time of trial – August 15, 1994, at 1:30 p.m. I therefore request that the jury trial be adjourned to permit mediation, and I am authorized to state that Attorney Johnson joins in this request.

I regret the timing of this request. In hindsight we should have agreed to mediate earlier. I assure the Court that neither party deliberately delayed this request in order to obtain an adjournment of the trial. Moreover, we are optimistic that mediation will resolve the matter and thereby save substantial judicial and private resources. Obviously we cannot guarantee that result, but we do guarantee our best and good faith efforts to achieve it. Judge Decker is the first choice of both parties as mediator, and we are confident of his abilities in this regard.

In the event that mediation is unsuccessful – a possibility which is hopefully remote – we would prefer the shortest possible adjournment.

Thank you for your consideration of this request. I shall call your calendar clerk to ascertain the Court's response.

Very truly yours,

/s/ Charles H. Barr
Charles H. Barr

hs

c: Atty Terry E. Johnson
Atty John Garofani

Morters v. Barr

Preliminary Written Statement of Principal Opinions

1. **Jury Trial Adjournment**

   A. Trial set for August 15, 1994, but "adjourned" to pursue mediation.

   B. Plaintiff denied being advised of adjournment.

   C. Client advises he wants to proceed to jury trial.

   D. Client, per medical records, appears permanent and stationary by August 15, 1994.

   Opinion I: Assuming the plaintiff's attorney has prepared his case and that there are no scheduling problems with critical witnesses, it is below the minimum standard of care to significantly delay jury trial in this matter. The mediation should have been explored in the months leading up to the trial date. If the court docket was congested, then perhaps the matter could have trailed (depending upon court's docket management) for a few days to allow mediation. This places maximum pressure upon the defense to put forth its best/highest offer.

   Opinion II: It is below the minimum standard of care to take a jury trial "off calendar" to explore binding arbitration without express client consent and documented by a writing. It is unclear what "adjournment" actually means in this context. It displays weakness to the defense to approach the coart at the last minute to avoid jury trial. Local Rule in California requires attorney to advise court under penalty of perjury that client has been so notified.

2. **Conflict of Interest Issues**

   A. Barr agrees to represent all parties initially.

   B. There does not appear to be evidence of negligence chargeable to either plaintiff for which one could sue the other. It is reasonable to belief [sic] at the outset, however, that the insurance carrier for the at fault driver may try to blame Ronald somehow. Moreover, without knowing the policy limits of the at fault driver, at the outset it is possible that there would not be sufficient limits to compensate all victims. Therefore, at the time of initial representation, there is the potential for a conflict of interest, but not an actual one.

   C. Plaintiff reports that during the litigation, he and his wife diverge in their feelings about whether this case should be arbitrated or tried. It is also determined that there are policy limits of $1,000,000.00.

   D. Barr researches the valuation of their claim and provides numbers between roughly $250,000.00-800,000.00. The file is unclear as to what informal conversations occurred between Johnson and Barr as to value.

   E. Barr encourages Plaintiff to settle the claim and not proceed, due to venue concerns, and fear of the seat belt defense and "emergency" defense. Plaintiff refuses.

   F. No statutory demand for the policy limits was made. Mention is made that a demand for $800,000.00 was made. For purposes of bad faith exposure and tactical concerns, the demand within policy limits (assuming consent was obtained from plaintiffs) places same pressure on insurance carrier except for 12% interest "penalty."

Opinion III: SCR 20:1.7 "(a) Lawyer shall not represent client if the representation of that client will be directly adverse to another client, unless: (1) The lawyer reasonably believe the representation will not adversely affect the relationship with the other client; and (2) each client consents in writing after consultation. (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents in writing after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Barr's conduct fell below the minimum standard of care in these respects: 1) There is no evidence Barr adequately evaluated the potential for conflict by separately interviewing each potential plaintiff and explaining that a conflict of interest may arise in the future, and obtain written waivers; 2) Ronald and Ann Marie became in conflict over the trial/arbitration issue. At that juncture, Barr was in a conflict of interest position as continuing to a jury trial (Ronald's wishes) had the potential of adversely affecting Ann Marie, and *vice versa*.

3. **Delay in filing suit**

   A. Plaintiff hired Barr with a few weeks of the accident.

   B. Suit not filed for several years.

C. No evidence of significant, meaningful negotiations.

D. Barr acknowledges that suit may get carrier to take case seriously.

Opinion IV: Delay invariably helps the defense. Unless there is an overriding medical reason justifying delay, the only reason for delay is attorney workload, laziness, oversight issues. Medical records suggest all plaintiff's medical conditions not an issue in justifying delay. The minimum standard of care requires the filing of the plaintiff's personal injury claim in this case no later than 12/91. Settlement negotiations may be undertaken during litigation rather than before litigation.

4. **Value of claim.**

Deferred.

K1

Law Offices Of

LEONARD W. SCHULZ

P.O. BOX 238
W230 S8775 CLARK STREET
BIG BEND, WISCONSIN 53103
PHONE: (414) 662-3100

January 22, 2000

Attorney Robert Sutton
2631 N. Downer Avenue
Milwaukee, Wisconsin 53211-4245

RE: Ronald W. Morters v. Charles H. Barr

Dear Attorney Sutton:

Pursuant to your request I have reviewed the file of Morters, et al. vs. Kuenzli, et al. From the file it appears the plaintiff, Ronald W. Morters' attorney failed to notify his clients that the defense counsel requested an adjournment of the trial date in the pending action. Based on the statements of Ronald W. Morters contained in the file, it appears that the adjournment was misrepresented to Ronald W. Morters as "being bumped by the Court". Based on this scenario it is my opinion that Ronald W. Morters was subjected to an intentional misrepresentation by his own counsel.

In addition Supreme Court Rule 20:1.4 provides as follows:

> "Communication (a): A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit

> the client to make informed decisions regarding the representation."

And the comment to this rule provides in part as follows:

> " . . . lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party."

The failure of Ronald W. Morters' counsel to comply with the above-stated rule constitutes negligence in my opinion.

The facts of this representation are further complicated by Attorney Barr's multiple representation of host and guest plaintiffs in a vehicle personal injury case. While the propriety of representing all parties plaintiff in the Kuenzli case is not as clear as the professional deficiencies referred to in the above two paragraphs it certainly was not helpful that the plaintiff Ronald W. Morters and his wife had divergent views about proceeding to a jury trial. Clearly separate representation by different counsel could have obviated this problem. The adjournment of the August 15, 1994 trial date severely aggravated the litigation tensions being experienced in particular by Ann Marie Morters. Finally, the opinion of Attorney Patrick Dunphy indicating $700,000.00 as the low end of the probable jury damage range would indicate the plaintiff, Morters, was substantially damaged by his failure to obtain a jury trial.

Based on the facts alleged by Ronald W. Morters, it is in my opinion to a reasonable degree of legal probability that the conduct of Attorney Charles H. Barr constituted malpractice in the context of the Kuenzli case.

Thank you for you attention.

Very truly yours,

/s/ Leonard W. Schulz
Leonard W. Schulz

LWS/kg

L1

CANNON & DUNPHY, S.C.
Attorneys at Law

[LOGO]

595 North Barker Road
P.O. Box 1750
Brookfield, WI 53008-1750
Telephone: (414) 782-2700
Facsimile: (414) 796-5800

[Names and Address Omitted In Printing]

*Please reply to the Brookfield Office

August 31, 1994

VIA FACSIMILE
Mr. Charles H. Barr
Croen & Barr
Suite 1020
250 East Wisconsin Avenue
Milwaukee, WI 53202

Re: Ronald, Ann and Shannon Morters v. Kuenzli, et al.

Dear Mr. Barr:

Thank you for providing me with materials concerning the Morters.

After reviewing the materials, I do not see that there would be any benefit in my becoming involved in the case. I believe and/or suspect that this may have been the reason for Mr. Morters' telephone call to me.

The analysis that you have presented to date shows that Mr. Morters has incurred medical expenses of $123,283.71 and that his claimed wage loss will be $230,659.62. His injuries are obviously severe and

disabling and would probably justify a full award of the wage loss. One caveat I would add is his pre-existing depression may cast the full wage loss into doubt, particularly the age 65 retirement assumption that you rely upon.

While predicting pain and suffering awards are always difficult and certainly not scientific, a $500,000 award for past and future pain and suffering would seem to be a reasonable expectation. This projection would put the value of Mr. Morters' case in the neighborhood of $800,000 to $850,000, in my estimation.

It is more difficult for me to get a handle on Mrs. Morters' case, but given her special damages of $20,000 and the spectar of "brain damage" raised by the report of Dr. Osmon, and coupled with the eyelid injury, hip and wrist fractures, her claim, too, is significant. Her pain and suffering could approach $250,000.

The fact that the combined damages of Mr. and Mrs. Morters exceed $1 million, however, must be tempered by two major considerations. First, this case is venued in Waukesha County. Historically, Waukesha County is conservative and inclined to render jury verdicts that are less than the average. This is particularly true in an era where conservative Republican juries are concerned about a "litigation explosion" and a "lawsuit crisis". Practically, this attitude means that a jury could award combined damages in the neighborhood of $750,000 and feel they have done justice to the Morters.

A second major factor is the liability. Mr. Kuenzli made a favorable impression at his deposition and his testimony will give the jury significant facts to determine that he was absolved of negligence because of the

road conditions. If a jury responds favorably to Mr. Kuenzli, there is a legitimate risk that they could use the slippery conditions instruction to absolve him of fault. While I like to think that is unlikely, it is a factor that must legitimately be considered in advising the Morters whether to accept the mediated offer that is presently on the table.

As I understand the "offer" it would consist of a payment of $575,000 plus a reduction by the subrogated carrier of $30,000. This has a net value to the plaintiffs of $605,000. Under the circumstances, I see this as on the low end of a range, of reasonable settlement value but I certainly see it as within that range.

Obviously, you are far more familiar with the strengths and weaknesses of this case, including the personalities of the parties. Ultimately, the recommendation that you make to your client must be one based on your independent evaluation. Nevertheless, I hope that my analysis will assist you in resolving this matter with Mr. Morters and obtaining for the family a reasonable result appreciated by all.

Very truly yours,

CANNON & DUNPHY, S.C.

/s/ Patrick O. Dunphy
Patrick O. Dunphy

POD/jb/encs.
dictated by [sic] not read.

STATE OF WISCONSIN	CIRCUIT COURT	MILWAUKEE COUNTY

RONALD W. MORTERS,

Plaintiff,

vs. Case No. 99-CV-5303

CHARLES H. BARR,

Defendant.

SHANNON L. MORTERS,

Plaintiff,

vs. Case No. 00-CV-1705

CHARLES BARR, et al.,

Defendants.

ORDER
(Defendant's Motion For Summary Judgment: Granted in Part and Denied in Part)

(Filed Jan. 17, 2001)

The defendants' motion for summary judgment was heard by the Court on January 8, 2001, plaintiffs appearing by attorney Robert E. Sutton and defendants appearing by attorney William P. Croke. For the reasons set forth on the record at that time, it is hereby ordered that:

1. Defendants' motion is **denied** insofar as it contends that plaintiffs' claims are barred by issue preclusion.

2. Defendants' motion is **denied** as premature insofar as it contends that the claims should be dismissed on public policy grounds, however, this contention may be reconsidered after a full factual record has been made.

3. On the defendants' contention that the plaintiffs will be unable to prove that the alleged negligence caused an injury, defendants motion is **granted** insofar as the complaints allege:

a. a failure by attorney Charles Barr to obtain a jury trial in the underlying case;

b. a failure by attorney Charles Barr to properly handle any conflict of interest.

However, on the defendants' contention that the plaintiffs will be unable to prove that the alleged negligence caused an injury, defendant's motion is **denied** insofar as the complaints allege that attorney Barr was negligent in failing to timely and adequately file and prepare the case and to timely and adequately make and pursue settlement demands.

4. Defendants' motion is **granted** with respect to the allegations in the complaint of plaintiff Ronald Morters that attorney Charles Barr mishandled certain matters relating to Morter's life insurance, specifically the allegations in paragraphs 17 and 18 of the second amended complaint.

5. No costs shall be allowed to either party on the motion.

6. A final pretrial conference is scheduled for **February 15, 2001, at 8:30 a.m.**

[SEAL]

Dated January 17, 2001.
By the Court:

/s/ John Franke
John Franke
Circuit Judge
Branch 25

STATE OF WISCONSIN	: CIRCUIT COURT BRANCH 25	: MILWAUKEE COUNTY

RONALD W. MORTERS, et al., Case Nos. 99-CV-1705
99-CV-5303

Plaintiffs,

-VS-

CHARLES H. BARR, et al.,

Defendants.

Proceedings were held on January 8, 2001

MOTION FOR SUMMARY JUDGMENT

JUDGE: JOHN FRANKE
CIRCUIT COURT JUDGE

APPEARANCES

ROBERT SUTTON, Attorney-at-Law, appeared on behalf of the Plaintiffs.

WILLIAM CROKE, Attorney-at-Law, appeared on behalf of the Defendants.

STEPHANIE L. JACKSON

OFFICIAL COURT REPORTER

* * *

[4] intervened as parties in the case seeking a chunk of the award?

MR. CROKE: Seeking their fees. Yes, Your Honor.

THE COURT: I've never had that happen but I assume that's not uncommon.

MR. CROKE: I've never been involved in this situation as well, Your Honor.

THE COURT: Maybe I should say not a natural. It is probably fairly rare but they're not parties to the case up until that point and then they – I don't know what you'd call them. They intervened in some respect claiming a right to –

MR. CROKE: They claimed – yes, Your Honor. They made a motion – brought a motion within the context of that case seeking their fees to enforce their contract, and Attorney Barr informs me that there was caselaw that he cited in his brief at that time to Judge Snyder – excuse me – to Judge Kieffer to establish the propriety of that procedure.

THE COURT: I'm going to deny the motion for summary judgment on the ground of issue preclusion. I agree that the same [5] general rule should apply to a lawsuit alleging malpractice as applied to other lawsuits, but I believe the application of those rulings results in a proper finding here that the Morters are not precluded from pursuing this issue in the context of a new claim for malpractice.

MR. SUTTON: May I –

THE COURT: The rules – I'm ruling in your favor. If you feel you need to argue and try to change my mind, I'll listen to you, Mr. Sutton.

MR. SUTTON: No, no. I just wanted to make – I won't say anything.

THE COURT: All right. The rules that I have used primarily come from the *Crozier* case.

MR. SUTTON: That's exactly what I was going to refer to.

THE COURT: And you said that in your brief, so its been said and it is a part of the record here in terms of your position.

The Court is required in situations like this to balance competing goals. And as *Crosier* [sic] and many others [sic] cases [6] describe this, this is balancing the goals involving judicial efficiency, finality, and the protection against repetitious litigation, all of which tend to weigh in favor of finding issue of preclusion against the right to litigate fully a person's claims.

While the goals of judicial efficiency and finality do tend to weigh in this case in favor of the defendants' motion, this is not a case where there has been anything that can be characterized as repetitious or harassing litigation and that goal I do not believe would be served by granting the defendants' motion.

I don't know that it matters terribly but this was a case where it is the same plaintiff who earlier brought the action that raised the issue. The action that raised the issue was apparently the request by Mr. Barr to get a proper share of the attorney's fees in the underlying civil case here. It was in the context of that motion brought by Mr. Barr that the defense claims this issue of malpractice or malfeasance was raised and fully litigated. It certainly was [7] raised. It certainly was litigated but not in the manner that I think requires a finding of issue of preclusion and not in a manner that I think warrants an issue of preclusion.

There's always going to be a claim of judicial deficiency when we throw this stuff out, and there would be a gain in that regard. *Closier* [sic] lists a number of factors which suggests appropriate considerations. The one in particular that I think is important here is the one that they give as No. 3.

MR. SUTTON: On page 688.

THE COURT: On page.688. I'm looking at the plaintiff's brief. But I did once again read this case in full and the third factor is whether significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issues.

I've had quite a bit of time to think about this, and I'm satisfied that given the context of the first case, that is, a motion for attorney's fees and whatever defenses might be brought in dismissing those fees, is a materially different type of case [8] and context than a case brought seeking damages for malpractice and that there is a very substantial difference in the quality and extensiveness of the proceedings between the two courts.

At some point *Crosier* [sic] also mentions that the right to a jury trial is a factor. I don't believe that it is a dispositive factor, but it certainly is at least a fair consideration. And in this case in the motion setting, there was no such right. And in the case of the claims brought now, there is a right to a jury trial. That's on page 688 of the *Crosier* [sic] case.

As plaintiff noted, while this was litigated, to some extent, in a setting that we have here, there is typically going to be expert evidence offered. In fact, it might be a requirement to prevail on the claim that there might be some expert evidence. These kind of things is not presented in the

motion hearing. Maybe it could have been but it would have taken a substantial amount of time and investment. And the fact that a party decides in the context of that motion not to litigate [9] to the extent of seeking and obtaining expert advice and might later in the context of a different case want to do that, I think that it is worth it, another factor with respect to the difference in the quality and extensiveness of the proceedings.

On balance, I think the right to litigate these issues fully takes precedence over whatever gain and the efficiency that there might be in the settings we might have. For those reasons, I'm going to deny the motion of damages on grounds of issue of preclusion.

The second ground, as I understand it, is the plaintiff lacks evidence to prove a causal relationship between any alleged negligence and some harm or loss suffered by either plaintiff. I think this has to be looked at, at least to some extent, in terms of the different theories of negligence that has been asserted and it's hard from the briefs to get a precise look at what the list of failures or claims of negligence are. But I think it is reasonably clear what they are, and I think we have to look at causation in terms of each of those various theories.

* * *

[43] know Arnie Anderson would have been screaming up and down the halls if there had been no expert testimony and the trial court was gonna allow it to go to a jury. These are experienced trial lawyers. They know how to try cases and they all do legal malpractice work. I know both firms do legal malpractice work.

(Whereupon, the Court views a document.)

THE COURT: I'm going to grant the motion for summary judgment in part and deny it in part. On the remaining grounds, I have to do whether there is any evidence of a causal connection between any act of negligence suffered by either plaintiff and the question of whether even assuming such causal connection, the claims should be dismissed on public policy grounds.

First with respect to the issue of cause, I believe that we have to distinguish the various allegations of negligence here and that this is not entirely a package deal. I think some of the allegations of negligence do come together and at least at [44] this point I'm going to find that if the expert testimony that is in this record now is admissible, there is a material issue of fact for the jury to decide.

One of the claims of negligence is that there was a failure on Barr's part somehow to provide or allow for a jury trial. Let me back up here. First of all, I find it does state a claim. There is no argument about that. I'm satisfied the answer properly joins issue. The question then is whether the moving party submissions state a prima facie case for summary judgment.

As to two of the theories of malpracticing, I'm satisfied that the defendants' submissions do state a prima facie case, and those items are one the failure of Barr to somehow provide for or obtain a jury trial; and the second is the alleged failure to properly address the conflict of interest. This was not a question at this point as to whether there is evidence of malpractice or negligence. It is a question of whether there is any causal connection between the alleged negligence acts – alleged negligence act and [45] any loss by the plaintiffs and I'm satisfied that there is not.

As to any claim resting on the jury trial, the plaintiffs continue – when I say "plaintiffs," I should refer to people. The Morters in the underlying action had that right even after Barr left the case, and there is no showing that there was any damage either in terms of the timing of the jury trial or what would have ultimately happened that resulted in some damage to the plaintiffs.

I don't know that Mr. Tessier can say what a jury would have done, although I guess that's implicit in the embodiment, opinion about the body of the case but that would seem to apply equally to what an arbitrator would do. Ultimately there was a choice here for arbitration and an award made, and there's been simply no showing other than speculation as to what might have happened had a jury ultimately rendered a decision in this case.

The only causal connection I can see is with respect to the conflict of interest ultimately fails for the same reasons. [46] The only argument that arguably flows out of this conflict issue is somehow this loss of a jury trial right, and once again there's nothing but speculation to link that alleged loss to any damage that the Morters suffered.

I also have to look to plaintiffs' submissions on this, and, I find nothing in what they have submitted including the rather vague expert opinions on this issue that constitutes an opinion that the conflict of interest failures of Mr. Barr led to any recognizable loss or damage. It remains purely speculative as to what would have happened and for those reasons, I'm going to grant the motion for summary judgment as to any claim of negligence based on failure to proceed to a jury trial or a failure to properly address the conflict of interest.

What remains are claims of negligence based on the alleged late filing of the case, a failure to make a claim against the insurance company for the maximum under the policy or failure to do that more promptly. The failure to file a settlement demand or perhaps what brings these three together is the [47] general allegation of a failure to properly prepare and present the case to the insurance company.

Now, in order for a jury to find a causal connection between that package of alleged negligence and damage to the Morters, there has to be one ever [sic] two things. There either have to be facts from which a jury could reasonably infer that there was ultimately a worst result or some damage to the Morters because of those failures. There certainly might be cases where a jury on its own could draw those inferences, but there are not such facts presented in this case.

I'm satisfied that the defendants have made a prima facie showing and the plaintiffs have failed to provide anything suggesting that there's a material issue of fact in terms of what a jury could reasonably infer from these facts and that it would be pure speculation on their part.

That brings me to the other thing that the plaintiff can rely on. It can either rely on facts from which the jury can make its own inferences on expert opinion and [48] as I mentioned at the outset, I think that the difficult question here is whether there is expert opinion evidence in the record that can get past a motion at this point, and I'm going to decide that there is.

I've looked in vein [sic] for some clear guidance as to the Court's role in evaluating expert testimony at the summary judgment stage. We have, of course, the *Hunzinger*

case that allows us to put the burden not on the moving party but on the party that will ultimately bear the burden at trial, at least whether discovery has been done and at least in situations where a defendant is not in a situation to do not more than say: You can't prove that claim or show us how.

I've struggled in other settings as to whether or not under *Hunzinger,* a party which relies on expert testimony is obligated at the summary judgment stage to put in the full and complete foundation for every opinion that's being relied on. One of the problems is that this often doesn't come up until the reply brief stage, that is, in the response, the nonmoving party, which in this [49] case has the burden, gives the expert testimony they're relying on and in the reply the other side says: Well, that's not admissible or that's not good enough or there isn't enough support for the expert opinion. Am I permitted at this point to go forward the same way I would if there were a full hearing on the admissibility of the expert? Am I permitted at this point to put the burden on the plaintiff, the Morters here, to have the full and complete foundation for expert testimony or something less than that sufficient at this point? I'm not sure there's a clear answer to those questions but in the absence of a clear answer, I'm going to find that at least in this setting, the plaintiff is not obligated to do more than offer some prima facie showing on foundation.

Even in the reply brief, it wasn't clear to me that defense was challenging the admissibility of the expert testimony. There was this statement in the reply briefs that the opinion is not founded in facts. I frankly did not know what that meant. There are clearly lots of facts on which the expert [50] could rely and apparently did rely.

The question is whether there is any reasonable basis to make a leap from those facts to the opinions offered.

In terms of some general valuation of the case at this point, I'm going to find that there is at least a prima facie showing of a foundation for the witness to offer some opinion about that. What is difficulty here is that the proof of causation, based on the theories that remain to the plaintiff, requires a showing that the insurance company would have acted in a certain way, that this particular insurance company would have rolled over and paid the maximums. That's what I understood Tessier to say in his deposition.

Since it was an adverse deposition, it doesn't include all of the foundation that there would presumably be when the proponent offers this at trial or in response to a motion to exclude. But that's what I understand him to say. And whether such an opinion is admissible or not is not something that I believe I can address on the [51] existing record or should address.

I have in other settings granted such motions where there is absolutely no evidence of a foundation for the opinion. And if in fact the issue is raised and fully litigated in terms of the foundation for the testimony, I think it would be reasonable to resolve it at this stage, but it has not been raised specifically by a question of the admissibility of the evidence and not fully litigated in terms of what foundation there might be for a lawyer experienced in these areas to testify to this kind of an opinion, and I'm not prepared to exclude it as a matter of law at this point.

If in fact a jury is going to get to hear an opinion that the insurance company would have rolled over and paid the maximum if this was properly presented, then I think

there's a material issue of fact for the jury to decide in this case. If they're not going to get to hear that, then there may well be no evidence to establish any causal connection between the negligence and any loss to the Morters.

[52] Now, the defense has contended, as I understand it, that even if this expert testimony is admissible, either *Schloemer* [sic] or *Seltrecht* would require that I dismiss the case at this point, and I would concede that there are some close calls as to both of those cases. But *Schloemer* [sic] is ultimately about public policy. It is not about the cause, and the Supreme Court specifically disagreed with the Court of Appeals' conclusions on public policy and essentially it found only that in that case, the injury was too remote from the negligence. That's a very fact specific finding and does not stand for the proposition that in any case of malpractice that there can be no causal connection between negligence and damages. It was possible that *Schloemer* [sic] stands for the proposition that as to the loss of the use of funds, in any case, that damage is lost. But to the extent that *Schloemer* [sic] does address the loss of value in the case and resolves it on public policy grounds,

I'm going to find that it is not binding on this case and that we should [53] proceed to hear the case and decide whether in this case, things are either too remote or too wholly out of proportion of the culpability of the negligence.

It is still not clear to me what the underlying evidence in *Schloemer* [sic] may have included, but the Court does not, at page 253, "We find no proof that demonstrates that the insurance carrier dealing with Attorney Perina, or the defense counsel for A.O. Smith, would have settled Lyle's

claim any earlier than it was done. All that exists is speculation."

As I said earlier, if in fact a jury hears Tessier utter some opinion on this, then I don't see how it could be speculative. *Seltrecht* was raised in the reply brief. And as I mentioned before, I relied on the quote that was in the brief and that states the issue as Judge Fine phrased it – it is a lengthy and fact-specific case, but I think we should first determine exactly what, if anything, the expert should be allowed to say and then decide whether if the expert says it was basically the same situation for each of [54] these lawyers, *Seltrecht* would require dismissal of the claim.

In *Seltrecht,* I believe the damage was the loss of the legal right to bring a suit, and while I haven't had time to review this carefully, there may certainly be the argument that the way Judge Fine phrased the question in the first paragraph of the decision as a reference to an issue that is limited to the situation where the claimed damage is an entire loss of a legal right, and at least in *Seltrecht* that right carried on after the first attorney accused of negligence was off the case and continued to exist and could have been remedied later on.

Whether that factual situation is binding on a situation that we have here, that there is an alleged loss of value in the case is not something I'm addressing today and at this point I'm not clear whether we even have expert testimony that makes that distinction or not. For those reasons, I'm going to deny the motion for summary judgment and find that there is a prima facie case at this point for an expert opinion. And if in [55] fact the jury hears expert opinion that is in the record now, there would

be a material issue of fact as to whether or not some combination of a late filing of the case, a failure to claim the policy limits, or a failure to file a settlement demand did cause some injury to the Morters. For those reasons the motion is denied.

As to those theories of negligence, it is granted as to any theory based on the question of right to a jury trial or the issue of a conflict of interest. Mr. Croke, do you think you can draft up an order –

MR. CROKE: I can, Your Honor. And I understand, Your Honor, those last two issues, the insurance issues, since they weren't replied to that motion is granted as well?

THE COURT: I am granting the motion to dismiss those other claims. As I said, I didn't find them in the amended summons and complaint. Maybe they were in there earlier, but I am granting the motion in those other respects. I've got another case that's been

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STATE OF WISCONSIN	CIRCUIT COURT BRANCH 25	MILWAUKEE COUNTY

RONALD W. MORTERS, et al., Case Nos. 99-CV-5303
00-CV-1705

Plaintiffs,

-VS-

CHARLES H. BARR, et al.,

Defendants.

Proceedings were held on May 15, 2001

JURY TRIAL – DAY 2

JUDGE: JOHN FRANKE
CIRCUIT COURT JUDGE

APPEARANCES

ROBERT E. SUTTON, Attorney-at-Law, appeared on behalf of the Plaintiffs.

WILLIAM PATRICK CROKE, Attorney-at-Law, appeared on behalf of the Defendants.

STEPHANIE L. JACKSON

OFFICIAL COURT REPORTER

* * *

[Excerpts from Tessier Testimony]

[221] opinion?

MR. CROKE: Same objection.

THE COURT: Well, excuse us, members of the jury. Let's have a side bar, counsel.

(Whereupon discussion held off the record at the side bar.)

MR. CROKE: Judge, we know what my objection is, not to have it interfere all the time. May I have a continuing objection?

THE COURT: You may.

Q (By Mr. Sutton) Do you have an opinion to a reasonable degree of certainty as to whether or not defendant, Charles Barr, exercised the minimum degree of skill, care, and judgment usually exercised by attorneys under like or similar circumstances in his representation of Ronald, Ann, and Shannon Morters?

A I have an opinion.

Q What is that opinion?

A That he did not.

Q And in what respects did he fail to exercise the minimum care?

A Three general areas. The first general area had to do with the investigation and preservation of evidence that was readily [222] available to him as lawyer for the Morters beginning in about January of 1991 when he was retained and specifically the failure to gather and keep photographs of the injuries of the plaintiff, a videotaped documentation of the suffering and the difficulties of life that Mr. and Mrs. Morter were enduring during a very substantial period of time after this incident occurred.

The secondary has to do with failing to get a settlement demand and package to work the case up, get a settlement demand to the defense for evaluation and consideration in a timely fashion; and then the third sort of relates to the second which is failing to get the lawsuit

on file in a timely fashion if and when the settlement negotiations don't result in settlement of the case. Those are the general areas.

Q With respect to the suffering of the plaintiffs, what did you review in the file that depicted the suffering and what experience are you talking about that they had after the accident, specifically with Mr. Ronald Morters?

A Um, in the file are several things, and in the

* * *

STATE OF WISCONSIN	: CIRCUIT COURT BRANCH 25	: MILWAUKEE COUNTY

RONALD MORTERS, et al.,
Plaintiffs,

-VS-

CHARLES BARR, et al.,
Defendants.

Case Nos. 99-CV-5303
00-CV-1705

Proceedings were held on May 16, 2001

JURY TRIAL – DAY 3

JUDGE: JOHN FRANKE
CIRCUIT COURT JUDGE

APPEARANCES

ROBERT E. SUTTON, Attorney-at-Law, appeared on behalf of the Plaintiffs.

WILLIAM PATRICK CROKE, Attorney-at-Law, appeared on behalf of the Defendants.

STEPHANIE L. JACKSON
OFFICIAL COURT REPORTER

* * *

[Excerpts from Tessier Testimony]

[29] THE COURT: If you want a continuing objection, I think that is sufficient to cover all grounds that have been raised and ruled on. But if you're objecting to this particular question about his –

MR. CROKE: No. Nothing different.

THE COURT: Excuse us for a moment. Let's have a side bar.

MR. CROKE: Judge, I got the message already.

THE COURT: Let's frame this in terms of an opinion about the reasonable lawyer and then things that I do will become much easier. Go ahead, Mr. Sutton.

Q (By Mr. Sutton) What is your opinion as to what a reasonable lawyer in exercising the appropriate degree of skill, care, and judgment usually exercised by attorneys under like or similar circumstances would value the case as?

A It's my opinion that the reasonable lawyer properly preparing the case would have a seven figure case.

Q By "figure" you mean $1 million?

A $1 million.

Q What do you base that on? Would you explain [30] that to the jury how a reasonable attorney exercising the degree of skill, care, and judgment usually exercised by attorneys under like or similar circumstances would reach the conclusion that his case was worth $1 million?

A As a plaintiff's attorney and as a mediator which I served in about four or five or six years in my practice, it's the same method. I'll share it with you on the board.

THE COURT: If this is going to be a lengthy answer, I think I'll interrupt, members of the jury and I'm going to give you a particular instruction about the evidence you have just heard and any evidence with respect expect [sic] to this opinion that the witness has offered about the value of the case.

Sometimes evidence is received for one purpose and not for another purpose and that's what's happening here. The opinion that has just been received, the opinion you just heard is received only on the issue of how a reasonable attorney should proceed to value this particular case; that is, a reasonable plaintiff's lawyer handling personal injury cases would proceed to value this case. It is [31] not received for the purpose of showing how a typical or reasonable defense attorney or insurance company would value the case. And it is not received for the purpose of showing what the insurance company at issue here or any insurance company would in fact pay in order to settle this case. So it's not received for those purposes and you must not consider this evidence as to those purposes. It is only received on the issue of how a reasonable plaintiff's lawyer handling personal injury cases under these circumstances would value the case. Also you can proceed with your answer.

THE WITNESS: Thank you, Your Honor. Yesterday we talked about the triangle of liability and damages in the pocket. In the simplest terms you have to take a percent of liability, multiply it by your damages, and that figure has to be less than or equal to the pocket.

So what I mean by that is if the liability situation is 100 percent in an automobile rear end accident, for example, where you're stopped, somebody plows into the back of you, you don't have any fault as the plaintiff. That would be 100 percent liability.

* * *

[Excerpts from Schulz Testimony]

[126] A Well, in this context I was expressing it as to Shannon's case but –

Q Let's stick to that, what you were expressing earlier. That just had to do with Shannon's case?

A Yes. Yes.

THE COURT: Mr. Sutton, any redirect?

REDIRECT EXAMINATION

BY MR. SUTTON:

Q Do you have an opinion as to when a reasonable or prudent attorney should have filed all the cases?

MR. CROKE: Objection, Your Honor. You know what? I'll withdraw it.

THE COURT: You may answer.

THE WITNESS: Yes.

Q (By Mr. Sutton) When?

A Within one year following the date of the accident.

Q When should a reasonable and prudent attorney have made the offer of settlement?

A Within one year following the date of the accident.

* * *

CIRCUIT COURT

STATE OF WISCONSIN MILWAUKEE COUNTY

RONALD W. MORTERS and
SHANNON MORTERS,

Plaintiffs,

vs.

CHARLES H. BARR, et al.,

Defendants.

Consolidated Case Nos.
99-CV-5303
99-CV-1705

DECISION AND ORDER

GRANTING DEFENDANTS' MOTION TO DISMISS AT THE CLOSE OF PLAINTIFFS' EVIDENCE

(Filed Jul. 3, 2001)

At the close of the plaintiff's case, the defendants moved for dismissal on the ground that the evidence was insufficient to establish a causal connection between the alleged negligence of defendant Charles Barr and any injury to the plaintiffs. For reasons set for on the record and further set forth below, I find that a reasonable jury, taking the evidence in the light most favorable to the plaintiffs, could not find that the defendant was responsible for any injury to the plaintiffs, and therefore defendants' motion is granted. The law does not provide a remedy for negligence unless injury can be shown, and plaintiff has failed to establish a compensable injury.

Background

In separate but consolidated complaints, Ronald Morters and his granddaughter, Shannon Morters, allege that in 1991 they retained attorney Charles Barr to represent them with respect to personal injury claims arising out of a motor vehicle accident, and that Barr was negligent in handling their claims. Ronald Morters' wife was also injured in the accident and was represented by attorney Barr, but she is deceased and is not a plaintiff in this legal malpractice action. Specifically, the complaints alleged that Barr was negligent in that he (1) failed to file the cases sooner; (2) ignored a conflict of interest between Ronald and Shannon; and (3) requested that the trial date be adjourned without their consent. The Ronald Morters claim additionally alleged that Barr was negligent in that he failed to make a demand on the insurance company and file a statutory offer of settlement.

These theories of negligence evolved as the cases progressed, and at trial the plaintiffs focused on Barr's failure to more effectively present a demand for settlement on the insurance company, in particular his failure to better preserve evidence of the injuries, most specifically his failure to videotape Ronald Morters' disabilities and difficulties in period immediately following the accident. However, it is primarily the question of the causal connection between the alleged negligence and an injury to the plaintiffs which has plagued this case from the outset.

Summary Judgement [sic] *Proceedings*

Much of the difficulty in analyzing the issue of cause stems from the failure of the plaintiffs to articulate a coherent and consistent theory of damages. Before I can

determine whether a wrongful act causes damages, both the act and the damages must be identified. At the time defendants' motion for summary judgement [sic] was heard, the plaintiffs failed to establish any evidence to suggest that the date of filing, the adjournment of the jury trial, or the "conflict of interest" resulted in any discernible monetary damage. Consequently, I granted summary judgement [sic] on those theories of negligence.

The only damage theory advanced in opposition to summary judgement [sic] was plaintiffs' claim that *if attorney Barr had properly prepared and presented the Morters' claims to the insurance company, the insurance company would have paid the policy limits.* See *Plaintiff's Brief in Opposition*, filed December 4, 2000, at 8-12; *Motion Hearing Tr.*, January 8, 2001, at 32-33.[1] Since the plaintiffs ultimately fired attorney Barr and proceeded to arbitration with new counsel, the damages were thus the difference between the policy limits of $1,000,000 and the $557,000 plaintiffs were ultimately awarded by arbitration.[2] In light of the arbitrator's award, it was obviously

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[1] No other damages or loss were identified, except for the claim that Barr's negligence cause a delay in the Morters' receipt of their damages for the auto accident. For reasons set forth in *Schloemer v. Perina*, 169 Wis. 2d 247 (1991), such damages are generally *not* compensable, and could be awarded here only if the evidence allowed for a finding that the insurance company would have settled the case earlier. *Id.*, 253-54. Since the plaintiff's proof on this issue ultimately failed, this damage theory also fails.

[2] Only damages were submitted to arbitration, and the total award for all three of the Morters was $557,384. By an agreement not disclosed to the arbitrator, this award was subject to a 10% reduction which apparently reflected the resolution of weak but cognizable defenses based on an "act of God" liability defense; contributory negligence, and the failure of each plaintiff to wear a seat belt.

not going to be easy to prove that a more timely and effective "demand package" would have netted the policy limits, but at the time of summary judgement the plaintiffs had expert opinion evidence in support [sic] this precise proposition, namely, the opinion of attorney Robert Tessier that if the claim had been more effectively presented to the insurance company the company would have promptly issued its check for $1,000,000. I ruled that *if* the jury was going to hear such an opinion, then jury would be entitled to accept it and find that damages had been established. *Id.*, 51.

However skeptical one might be about such an expert opinion, I determined that the issue of the admissibility of the opinion was not sufficiently before the court at that time.[3] As a result of a subsequent motion in limine, this critical opinion testimony was excluded, but the issue of summary judgment was not revisited in light of that ruling, and the case proceeded to trial.

Trial

In the required pretrial reports, plaintiffs set forth no theory of damages, and the case proceeded to trial based

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[3] The extent to which the court can rule on the admissibility of expert evidence at the summary judgement stage is not entirely clear. I took the position that the court may exclude such evidence where the proponent of the opiion has not established a *prima facie* foundation for its admissibility, but should do so only where the proponent has been given notice that admissibility is at issue and has had the opportunity to present a full foundation for the opinion, that is, where there has been the equivalent of a motion in limine to exclude the opinion. In this case, there had been no clear challenge to the admissibility of the Tessier opinion. *Motion Hearing Tr.*, January 8, 2001, at 48-51.

on the narrow theory of negligence which had survived summary judgment. At trial, the plaintiffs were given considerable latitude in presenting evidence that went beyond that theory, in order to permit the jury to understand the context in which the alleged negligence occurred and to judge the credibility of the witnesses. Inevitably, however, plaintiff's proof fails because, without the stricken expert opinion, there is no basis on which the jury could conclude that the insurance company would have settled the case for the policy limits, even indulging all inferences in favor to the plaintiffs.

Even had the jury been given the full facts of the underlying personal injury case, common knowledge is not sufficient to permit jurors to form their own conclusions about what an insurance company would have done in response to a more effective demand from the plaintiffs. The only evidence on this question was the testimony of Terry Johnson, the attorney who represented the insurance company in the underlying case, that the company would not have paid more than the figure it offered during mediation. Thus, it is speculation for plaintiffs' to even suggest that the insurance company *might* have paid the policy limits, much less contend that they have met their burden to show that the insurance company would actually have done so.

Plaintiffs also contend that Barr was negligent in failing to make separate settlement demands for each of the plaintiffs, but have not shown how such a failure resulted in any damages. This contention is also inconsistent with the claim that Ronald Morters was adamant that the family members not compete against each other for settlement dollars. The insurance company would not have cared how the money was divided, and if separate

demands exceeding the policy limits had caused the insurance company to offer the limits, the separate demands would have reflected *the plaintiffs' assessment of the relative value of their respective claims.*

In opposing the motion to dismiss, plaintiffs seem to have advanced a new damage theory, contending that the damages should be the difference between what they actually got and what they "should have received," and further that the jury could make this calculation because it had evidence of "the value of the case." If this is merely a restatement of the argument that the jury could find that the insurance company would have paid the policy limits, then it fails for reasons discussed above.

If plaintiffs are now suggesting that damages should be measured by trying "a suit within a suit," the argument fails for several reasons. First, such a method is only appropriate where the issues have not be [sic] tried, as in a case where a lawyer misses the statute of limitations, and the plaintiff's loss can only be measured by actually trying the entire underlying case to the jury. *See, e.g., Lewandowski v. Continental Casualty Co.*, 88 Wis. 2d 271 (1979). In the present case, the issues were resolved, liability by stipulation and damages by arbitration. Moreover, a major part of the plaintiff's theory of negligence was the failure to preserve evidence, essentially videotapes and pictures of the Morters' pain and suffering. Such an alleged defect cannot be corrected by trying the case a second time without such evidence.

In addition, the plaintiffs did not indicate any intention to fully try the underlying auto accident case and did not present the evidence necessary for the jury to make its own decision about the merits of that case. For example,

there was no notice that this jury would be asked to decide issues of liability and plaintiffs offered no medical opinion evidence regarding the cause of or permanent nature of any injuries.

Finally, if plaintiffs are now suggesting that the jury is entitled to determine an abstract pretrial "value" of a personal injury claim, the argument fails because this is not a valid damage theory, particularly not where a case has proceeded to an objective resolution. Even were the courts to recognize such a theory, it would require evidence of an *objective* value of the case rather than evidence of how a plaintiff's lawyer would value a case for settlement purposes.

The jury heard Mr. Tessier testify that a reasonable and prudent plaintiff's lawyer would value the case "at seven figures," but this "value of the case" was specifically presented as a part of the process a plaintiff's lawyer would follow in considering and making settlement demands. Tessier testified as to how a reasonable *plaintiff's lawyer* would value the damages part of the case; he did not testify to an opinions [sic] about how a reasonable jury might value the damages; how such a jury would resolve the plaintiff's liability; or how such a jury would resolve the seat belt defense issues, nor would he have been permitted to testify to any such opinions.[4]

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[4] One might infer that such a determination of the "value of the case" is influenced by an assessment of what a jury would eventually do, but there was no indication of the extent to which this influenced the value. One could equally infer that the plaintiff's lawyer is inclined to value the case for settlement purposes as high as possible, and that his duty to his client obligates him to do so. Assuming that there is

(Continued on following page)

The Tessier opinions were received only for this limited purpose, and the jury was instructed that it could not consider this evidence for the purpose of determining what an insurance company might offer to settle the case. The jury would have been similarly instructed regarding the question of what a jury might award, but I did not understand the defendant to have advanced any such theory of damages. The only evidence of an objective value of the case – of what plaintiffs "should have been received" – was the arbitrator's award, less the liability discount. This was, of course, the amount they actually did receive.

Conclusion

Therefore, it is ordered that defendants' motion to dismiss the plaintiffs case is granted and judgement [sic] shall enter in favor of the defendants and against the plaintiffs.

Dated July 3, 2001.
By the Court:

/s/ John Franke
John Franke
Circuit Judge
Branch 25

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some abstract "value of a case" which can be *objectively* determined before a trial, no such evidence was presented.

Q1

CIRCUIT COURT

STATE OF WISCONSIN MILWAUKEE COUNTY

RONALD W. MORTERS,

Plaintiff,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

Case No. 99-CV-005303
Case Code: 30703

SHANNON L. MORTARS [sic],

Plaintiff,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

Case No. 00-CV-001705
Case Code: 30703

NOTICE OF MOTION AND MOTION FOR FRIVOLOUS CLAIMS AND REASONABLE ATTORNEYS' FEES

TO: Robert E. Sutton
2631 North Downer Avenue
Milwaukee, WI 53211
Attorney for Plaintiffs

PLEASE TAKE NOTICE that on a date and time to be set by the court, as before the Honorable John Franke, presiding, in his courtroom, Milwaukee County Courthouse, 901 North Ninth Street, Milwaukee, Wisconsin, the defendants, Charles H. Barr and TIG Insurance Company, by their attorneys, Quale, Feldbruegge, Calvelli, Thom & Croke, S.C., hereby move the Court pursuant to §§ 814.025

and 814.04, Stats., for an Order deeming the plaintiffs' claims as frivolous, entitling the defendants to their reasonable attorney's fees, and actual costs in the defense of these actions.

The grounds for this motion are as follows: That pursuant to § 814.025, Stats., several of the plaintiffs' claims asserted within his their pleadings are frivolous having no basis in law and/or fact.

This motion is supported by the attached Brief of Charles H. Barr and TIG Insurance Company and also by the Motion and Brief in Support of Motion For Frivolous Claims and Reasonable Attorneys' Fees.

Dated this 20th day of June, 2001.

QUALE, FELDBRUEGGE, CALVELLI, THOM & CROKE, S.C.

By /s/ Todd M. Rowe
William P. Croke
State Bar No. 1012156
Michael J. Burr
State Bar No. 1023190
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State Bar No. 10303931
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